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"The Things that Death will buy": A Sociolegal Examination of Texas Death-Sentenced Prisoners Who Sought Execution

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"The Things that Death will buy": A Sociolegal Examination of Texas Death-Sentenced Prisoners Who Sought Execution

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Dedication

To RCO

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None of this turned out as I had planned – for which I am profoundly grateful. I went to graduate school to "cool out" my reputation with certain criminal justice agencies and to gain some new skills. Just a few classes with Gideon Sjoberg, however, had me enthralled with the sociological enterprise. I continue to be influenced by the breadth and depth of his sociological vision. It was an honor to be his student.

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"The Things that Death will buy": A Sociolegal Examination of Texas Death-Sentenced Prisoners Who Sought Execution

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This dissertation analyzes social and legal influences on Texas death-sentenced prisoners who hastened their own execution. Using variables derived from research on other types of decisions to hasten death, I compare these prisoners with other similarly-situated condemned prisoners who did not seek to hasten execution, and develop a theoretical model for their decisions. In addition, I examine both how these prisoners explain their decisions, and how court proceedings can shape these explanations. The dissertation concludes with a discussion of the sociolegal construction of different rights to die.

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– Emily Dickinson

INTRODUCTION

In this dissertation, I examine Texas death-sentenced prisoners who successfully hastened their execution ("execution-hasteners" or EHs).[1] Nationally, execution-hasteners constitute about 11% of those executed, and about the same number of execution-hasteners (about 137) have been executed as death-sentenced prisoners have been exonerated (about 140) (Death Penalty Information Center 2012). While the exonerated have prompted condemnations of the legal processes leading to their death sentences, we are less certain how to interpret execution-hasteners. Are they committing suicide? This is a population widely believed to be disproportionately burdened by mental illness, a risk factor for suicide. Are they asserting an autonomy we should honor as part of some commitment to fundamental human dignity? A lot of people go to prison who do not want to be there. Prisons do not therefore permit them to take their own lives.

Others have argued execution-hasteners usurp the sovereign's power by deciding their own punishment and wresting authority over legitimate killing from the state's exclusive purview (Thurschwell 2009:290-291), Further, for every execution-hastener, a death penalty conviction and sentence is not reviewed. Legal errors with potentially systemic implications may continue uncorrected. How do we balance the effect of their individual decision not to appeal on the overall legitimacy of the death penalty system

[1] Death-sentenced prisoners who drop their appeals in order to hasten their executions are commonly called "volunteers" (Brisman 2009; Harrington 2000). To avoid the connotations of free will and civic-mindedness associated with the word "volunteer," I instead call them "hasteners."

which relies, at least in part, on the legal testing of the appropriateness of the death penalty?

This dissertation takes a sociological approach to desires to hasten death to examine who these prisoners were and how, when, and why some abandoned their appeals and hastened execution. In addition, it integrates a discussion of legal processes into its analysis. While being an execution-hastener is a social and psychological experience, it is also one substantially constructed by the law. If there were no appeals, one could not be a "volunteer." By the same token, if the law prohibited appeal waivers, one could not be either. I therefore discuss the ways in which the law and litigation define and structure the execution-hasteners' experience.

This study proceeds in three parts. The first section sketches the literature regarding decisions to hasten death and proposes a theory of execution-hastening. It then outlines the legal procedures that enable a condemned prisoner to expedite his execution and particularly influential Texas cases regarding EHs. Finally, it describes this research was conducted. The second section describes the data supporting the proposed theory for decisions to hasten execution, as well as the meanings constructed for EHs' deaths. The third section considers the operation of the law in this context. It analyzes courtroom discourses to examine how at least some of these meanings are produced, and reflects on the profoundly different legal framework surrounding rights to die for condemned prisoners and individuals with terminal illness.

PART ONE

Chapter 1

Review of Literature on Decisions to Hasten Death

Certain basic narratives dominate American popular debate over what execution-hasteners are doing. Those who oppose a condemned prisoner's request for execution often cite the prisoner's history of mental instability and frame the prisoner's decision as a product of suicidal depression. Related to this narrative is one that links death row conditions to the prisoner's decision to hasten death. Conditions, in this account, contribute to the decision to abandon appeals by wearing the prisoner down to the point that he loses the will to live, or because of "death row syndrome," an evolving psychiatric diagnosis describing a mental condition that some prisoners develop as a result of living under a death sentence in highly socially isolating and stark conditions of confinement. Other narratives focus on ideas of rational choice and personal autonomy. This narrative emphasizes prisoners' desire to control their own destiny and the civic virtue of respecting autonomy and choice, even for the least among us (Muschert, Harrington, and Reece 2009; Smith 2008).

The empirical support for any of these narratives is sparse. Only two studies have conducted an empirical investigation beyond the individual case study. John Blume (2005) asked whether EHs nationally resembled the non-incarcerated or "free-world" American suicide population. After collecting questionnaire responses from legal team members in cases involving EHs and attempted EHs, Blume reviewed the literature on

free-world suicide. He concluded that important similarities existed between free-world suicides and death row execution-hasteners. In addition to being a predominantly white male phenomenon, both groups have significant histories of mental illness and substance abuse. In addition, he found some support for the proposition that like suicide, one individual execution hastening can spur other to do the same, i.e., can be "contagious." Blume found little support for the contention that prison conditions affect decisions to hasten execution.

The primary limitation of this study is the absence of a comparison group of non-execution-hastening death row population. As Cunningham and Vigen (2002) have pointed out, the death row population as a whole has a high prevalence of mental illness and substance abuse and addiction. In addition, Blume measured contagion by execution date, rather than by point of decision, which, I argue below, is the more relevant date.

Vandiver, Giacopassi, and Turner (2008) overcame the comparison group limitation in part by comparing all EHs nationally to all executed non-EHs. Their study provided a statistical profile of EHs (discussed in greater detail in Chapter 3 and 4), and proposed an "exploratory typology" of EHs based on "reviews of academic studies, newspaper interviews of volunteers, published accounts of volunteers' backgrounds and crimes, final statements given by volunteers before their executions, discussions with defense lawyers and mitigation specialists, and the experience of one of the authors in several cases" (id., 188, 195). They suggested that EHs could be categorized as "tough guy," "martyr," "suicidal," "remorseful," or "mentally ill," citing two or three individuals

who illustrated the traits of this type. While not quantifying the number of EHs who fell into the different categories, they noted that "martyrs," i.e., individuals who committed their capital offense to further a larger political message, was a rare phenomenon.

The limitations of this study, however, are at least three-fold. First, they also used execution date rather than decision-point data. In addition, as with the Blume study, they analyzed EHs executed nationally, which could conceal important state-level variation. Some counties – like Harris County, Texas, for example – are responsible for more executions than several states combined. Some states such as Nevada (11 out of 12), Oregon (two out of two), and Washington (three out of five) have executed almost exclusively execution-hasteners (Death Penalty Information Center Execution Database). Some states execute so few that a prisoner might expect to live decades on death row before facing execution. Death row conditions also vary across states. If any of these factors matter, it is reasonable to believe that the dynamics in hastening execution could be very different in different places. Comparing all execution-hasteners with all those executed in the modern era would erase these differences.

Finally, Vandiver and her colleagues relied on the database created by the Death Penalty Information Center (DPIC). In my study, I found that while invaluable in many ways, some of its coding decisions regarding who was a "volunteer" risked overlooking important information. For example, and as I discuss below, DPIC lists one Texas prisoner as a "volunteer" because he declined the opportunity to pursue a second round of appeals, *i.e.*, so-called "successor" litigation, which is not routinely advanced by Texas

death-sentenced prisoners. In fact, most prisoners do not have counsel at this stage as counsel will generally not be appointed by any court. Therefore, the considerations for forfeiting that opportunity likely vary considerably. At the same time, DPIC does not include anyone who changed his mind. While I do not include every Texas death row prisoner who changed his mind, I did include two who changed their minds repeatedly as they approached execution. In the heat of execution-eve litigation, what they really wanted was not clear. In addition, I identified two Texas prisoners who abandoned their appeals, but were simply not listed as "volunteers" in the DPIC execution database.

This study contributes to the limited empirical basis for the popular debates about EHs, and extends Blume's and Vandiver, Giacopassi, and Turner's findings by overcoming some of the limitations of their research. It conducts the first comparison of execution-hasteners with group of similarly situated non-EH death row prisoners. It trades the national view for the specificity of Texas and condemned prisoners' common experiences of its death penalty system and death row. It also did not rely on a single source for identifying EHs, instead conducting an original investigation into who abandoned appeals. It moves beyond typology to introduce a theoretical model for the processes that contribute to decisions to hasten execution. In addition to comparing certain characteristics between populations (such as experiences with mental health problems), it broadens the analysis to include a larger number of characteristics linked to suicide, and particularly prisoner suicide. Further, it deconstructs some of the variables believed to be associated with prisoner suicide to try to understand what aspects of those

variables may make them significant. For example, recognizing the prisoners convicted of violent crimes are at a higher risk of suicide, this study considers whether certain features of the capital crime may be significant in distinguishing who among capital murderers may be more likely to seek to hasten execution. Finally, this study represents the only effort I am aware of to examine how the legal system structures decisions to hasten execution.

SOCIOLOGICAL RISK FACTORS FOR SUICIDE

Durkheim staked a claim for sociology in the study of self-destruction in *On Suicide*, where he adopted the definition of suicide that I use in this dissertation: "any death which is the direct or indirect result of a positive or negative act accomplished by the victim himself" (Durkheim [1897] 1966:42). Durkheim, examining the problem on an aggregate level, theorized that suicide should be understood along two axes: social integration and social regulation. He identified four types of suicide, reflecting different combinations of the extremes of each axis. Social integration offered "a sense of social belonging and inclusion, the love, care, and concern that can flow (or not flow) from social ties" (Wray, Colen, Pescosolido 2011:507). This integration could provide an emotional buffer for people during difficult times and therefore help stem the desire for self-destruction. Too much integration could lead to "altruistic" suicide, i.e., destroying the self in order to benefit the whole. Too little, the individual was susceptible to "egostic" suicide. Regulation, by contrast, consisted of social controls that constrained individuals and thereby protected them from "desires and expectation that will exceed their grasp, with the resulting failures and frustrations leading to continuous states of despair" (id., 508). Too little social regulation led to "anomic" suicide, and too much, to

"fatalistic" suicide. While famously relegated to a footnote, the question of "fatalistic" suicide is naturally raised in the highly regulated prison setting.

Vandiver and her colleagues drew on Durkheim's theory of suicide in arguing that the "tough guy" resembled Durkheim's egoistic suicide and the "remorseful," the highly integrated altruistic suicide. They contend that generally anomic suicide is not relevant, with the little-known fatalistic suicide of the highly regulated more so. Overall, they argue that Durkheim's macro-level approach is a bad fit for this population because of death row's extreme environment and the population's history of childhood abuse, dysfunctional families and mental illness (Vandiver et al. 2008).

Maris (1981) used a life-course perspective to conceptualize the "suicidal career." He argued that suicide should be understood as the outcome of a developmental process, a process neglected by a focus on vital statistics data. He explained:

> Most people do not suicide. Suicidal resolution of the human condition tends to occur (a) when one's life is and has been exceedingly harsh; (b) when nonsuicidal alternatives are blocked or used up (what I refer to as a 'constriction of the adaptive repertoire"); (c) when suicide is positively valued, prescribed, encouraged by suicidal role models, etc.; (d) when tolerance thresholds for coping with the human condition have been breeched [sic] *repeatedly*; (e) when individuals are male and/or aged or when individual s are otherwise "unfit" for coping with life struggles (e.g., genetically); and (f) when individuals are isolated from love and support (Maris 1981:xix).

Maris could well have been describing suicidogenic aspects of modern day incarceration. Prisoners, especially those convicted of serious crimes, generally face very harsh conditions of confinement. Further, a signal pain of imprisonment is their isolation from love and support. As Sykes noted, not only does prison degrade social ties to the loved ones on the outside, but it also constitutes "a deliberate, moral rejection of the criminal by the free community" (1958:65). "[T]he loss of that more diffuse status which

defines the individual as someone to be trusted or as morally acceptable is the loss which hurts most" (id., 67).

They are also usually male (and in this study, all male), have had unusually difficult childhoods, and have some "unfitness," such as histories of addiction, personality disorders, or mental illness (see also Wray, Colen, & Pescosolido 2011; Nock et al. 2008; Cunningham & Vigen 2002). Cunningham and Vigen's critical review of the literature on death row prisoners noted that 11 out of 13 clinical studies of death row prisoners found "a high incidence of psychological symptoms and disorder, ranging from maladaptive defenses to pervasive depression, mood lability, and diminished mental acuity to episodic and chronic psychosis" (2002:200). Death row prisoners also "appear to have a disproportionate rate of serious psychological disorders relative to a general prison population" (Cunningham & Vigen 2002:200). Neurological abnormalities and neuropsychological impairments are "frequently observed," as are histories of substance abuse and intoxication, and childhood family dysfunction (Cunningham & Vigen 2002:201-02).

Not all prisoners, of course, suicide. Research into prisoner suicide is potentially fraught with even more reporting concerns than in the free-world as, e.g., prisons potentially fear legal liability for failing to prevent suicide. Liebling has complained that prison suicides are also underreported because prison deaths are officially identified as suicides when they conform to expectations of what suicide "looks like" (1999:290). Further, most prison suicide studies have been based on relatively small populations, which raises questions about the reliability of their findings (Borrill 2002; Lester and Danto 1993). With those caveats, prison researchers have identified certain characteristics associated with higher rates of suicide. Generally prisoners who commit

suicide are male, relatively young (generally less than 35 years old), and white (Fazel 2008; Liebling 1999; Anno 1985).

Prison sentences matter. Long and indeterminate sentences are associated with increased risk of suicide (Fazel 2008; Crighton and Towl 2008; Liebling 1999; Anno 1985). An early study of suicides on death row between 1977 and 1982 found remarkably high rates of suicide given how hard it was to commit suicide in death row's heightened security (Danto and Lester 1993). A more recent study found that between 1978 and 1999, death row prisoners had significantly higher rates of suicide compared to non-death row prisoners, but that the rate declined as the death row population grew (Tartaro and Lester 2008).

Prison suicide has temporal pattern, with a "very robust finding… that the early stages of custody show the highest rates of self-inflicted deaths in prisons" (Crighton and Towl 2008:188). Only after about two months in detention does the risk of suicide subside (Crighton and Towl 2008). A British study of prisoners serving life sentences, a category of prisoner already known to be at a higher risk for suicide, examined a somewhat different pattern in the suicidal lifers' time between prison reception and death, but one that attests to how early in their incarceration prisoners are likely to suicide. About half were likely to kill themselves within a year of conviction, and about half after a year (Borrill 2002).

Prisoners who commit suicide have had childhoods marked by, e.g., poor family support, delinquency, or psychiatric treatment, and have slightly more prior convictions than those who do not commit suicide (Liebling 1999). They tend to have committed crimes against people, with those committing homicides having the highest rates of

suicide (Crighton and Towl 2008; Borrill 2002; Lester and Danto 1993; Anno 1985; *but see* Liebling 1999:297, citing contradictory findings).

Liebling (1999) and Anno (1985) suggest that those who killed their own family members are at particularly high risk of suicide. The higher risk for those who killed a family member suggests a possible continuum between those who suicide in custody for an IPV-related homicide and conventional murder-suicides. Perpetrators of murder-suicides are generally male and their victims are generally their current or estranged wives or girlfriends. They typically are white and are older than other murderers. The offenses are usually linked to a disruption in the romantic relationship where the perpetrator fears losing the victim. They tend not to have serious criminal histories, but do have a history of depression (Eliason 2009; Liem, Hengeveld & Koenraadt 2009; Liem, Postulart, & Nieuwbeerta 2009; Starzomski and Nussbaum 2000; Stack 1997).

One study of homicide-parasuicides also found that uxoricides (homicide of a spouse), whether or not committed by a suicide attempt, were typically motivated by "fear of abandonment or narcissistic rage" (Liem, Hengeveld & Koenraadt 2009:506). In the latter case, "[w]hen self-esteem is lowered or threatened by rejection or divorce, aggression arises as in instrument of recovery" (id. at 511). The suicide attempt was linked to "feelings of guilt related to the homicide, fear of judicial consequences, or a wish to be reunited with the victim in death" (id. at 509).

Liem and her colleagues speculate that the older age of homicide-suicide perpetrators:

> [C]an be ascribed to the difficulty to respond [sic] to life-changing events that jeopardize self-concept, such as … a breakdown in the marital relationship. Replacing these identity supports … as an intimate partner is more difficult for an older person than it is for a younger person in the same predicament (Liem, Hengeveld & Koenraadt 2009:510).

Mental illness puts prisoners at higher risk for suicide, though not always in ways we might expect. As in the free world, suicide in prison is associated with histories of substance abuse and/or mental illness (Fazel 2008; Baillargeon et al 2009), but not at the same rate as in the free world. Liebling (1999) found that only about a third of prisoners who completed a suicide had a history of mental illness, in contrast with 80%-90% in the free world. She explains: "A high proportion are found to have psychological difficulties falling short of a formal psychiatric diagnosis, such as alcohol or drug problems, personality disorders or borderline personality disorders, self-reported anxiety and depression" (Liebling 1999: 296).[2] Liebling notes that a "disproportionate number" were diagnosed with personality disorders (1999:318). The review of Texas prisoner suicides undertaken by Baillargeon et al. (2009) found major depressive disorder, bipolar disorder, schizophrenia and nonschizophrenic psychotic disorder put prisoners at higher risk of suicide.

Prison conditions also matter and may interact dangerously with mental disorders. Those in more secure, segregated, or single cells have higher rates of suicide (Fazel 2008; Tartaro and Lester 2008; Liebling 1999; Lester and Danto 1993). The administrative segregation conditions in which Texas death row prisoners now live have been linked to heightened anxiety and paranoia, hallucinations, self-mutilation, suicidal ideation and suicide attempts, hopelessness, and aggression (Haney 2003). In addition, people with certain psychological disorders, particularly those related to impulse control problems, brain damage, and personality disorders, appear to be at particular risk (Madrid v. Gomez

[2] This discrepancy may also reflect barriers to mental health care in prison and reluctance to characterize a prisoner's behavior as the product of mental illness (Rhodes 2004).

1995). These are among the problems Cunningham and Vigen (2002) identified death row prisoners as having.

While the literature on prisoner suicide helps structure an examination of the Texas EH data, it does not capture another critical aspect of these prisoners's lives, namely that they live under a death sentence. Managing this confrontation with mortality – facing how to "get dead" (Green 2008:18) – is a different task than contending with the pains of imprisonment. Therefore, I consider some of the research on desires to hasten death among those with terminal illness. The analogy between living under a literal death sentence and living with a diagnosis of a terminal illness is sometimes invoked in these cases by mental health professionals and also in some of the legal literature (D. Martinez, federal court order July 29, 2007, 3; Milner 1998; Johnson 1981). Unfortunately, it is generally uninformed by empirical research on those living with terminal illness. Those who use this analogy treat as a given that those living with a terminal illness want to hasten death, and/or that individuals living under a death sentence will inevitably face execution. Research on decisions to hasten death (DHD) among people with severe and terminal illness reflects their nuanced thinking with respect to hastening death (Nissim, Gagliese, Rodin 2009). Further, even Texas's vigorous use of the death penalty does not result in the execution of everyone sentenced to death (Snell 2011).

Among those living with terminal illness, researchers have found that desires to hasten death are transitory (Hudson et al. 2006; see also Covinsky et al. 2000 regarding transient wishes for CPR among those with serious illness). In addition, they are often occasioned by particularly discouraging events (Nissim, Gagliese & Rodin 2009; Johansen et al. 2005). Some patients report that their desire to hasten death "was most

profound at the time of diagnosis. For others, it was triggered by waiting for medical appointments, by receiving disappointing test results, or by the exacerbation of physical symptoms" (Nissim, Gagliese & Rodin 2009:169). This is consistent with suicide research findings that stressful life events increase risk of decisions to hasten death (Nock et al. 2008).

Family ties could help very ill patients maintain a desire to live, whether to see children grow up and/or because of a "sense of duty and commitment" toward their children (id. at 169). They also feared that hastening their deaths would pain and stigmatize their children. Some individuals with terminal illnesses, however, connected their desire to hasten death to the burden they perceived as imposing on others, including family members (Mak and Elwyn 2005).

TOWARDS A THEORETICAL MODEL

Based on this literature, I identified the following variables as potentially associated with decisions to hasten death: sex, age, temporal patterns with respect to when the decision occurs within the span of incarceration, triggering events, childhood factors such as poor family support, delinquency, or childhood psychiatric treatment, number of prior convictions, crimes against people, killing family members, mental illness, and prison conditions.

In addition to coding data related to these variables, I also sought to adapt my inquiry to the specific situation of the population under study, namely that all were in prison for having committed a violent offense.

To discriminate among violent offenses, I separated gun deaths from non-gun deaths, since the amount of effort required to kill someone with a gun is usually less than

with other lethal instruments. If it is the experience of inflicting violence that contributes to hastening decisions to hasten death, distinguishing between those who fire a gun and those who, e.g., use their bare hands or blunt instruments, could be useful. (None of the cases involved less violent lethal methods such as poisoning.)

Social scientists have also found important differences in group and individual offending. Acting in groups may encourage offending by diffusing responsibility (Alarid, Burton, and Hochstetler 2009). Conversely, solo offending may concentrate a sense of greater responsibility in the individual actor, both in the eyes of actor and those around him. This greater responsibility may be linked to a conclusion that the individual offended for dispositional rather than situational reasons (Feldman and Rosen 1978). Shame and guilt have been linked to an increased risk of suicide (Lester 1997; Hendin and Haas 1991). To capture this dynamic of intensified responsibility, I coded whether the offender committed the capital crime with another person.

While I propose a theoretical model, the small population prevents any testing in the conventional sense. Instead, I use it as a tool to organize conceptually the processes and factors that may lead to abandoning appeals. As the figure indicates, I hypothesize that multiple processes contribute to persuade a condemned prisoner to abandon his appeals. One, negative childhood experiences, such as parental abuse or neglect, delinquency or psychiatric intervention, may make him vulnerable to desires to hasten death. Two, experiences related to the capital crime and prior offending may shape the prisoner's sense of self and his "just deserts." I call this "social culpability" to invoke the

social constructedness of feelings of guilt. Third, I incorporate both prison conditions and dynamic factors as contributing to an enhanced motivation to waive appeals. The role of social integration is less clear as the literature on those with terminal illness shows ambivalence. Therefore, while I consider it, I did not incorporate it into the model.

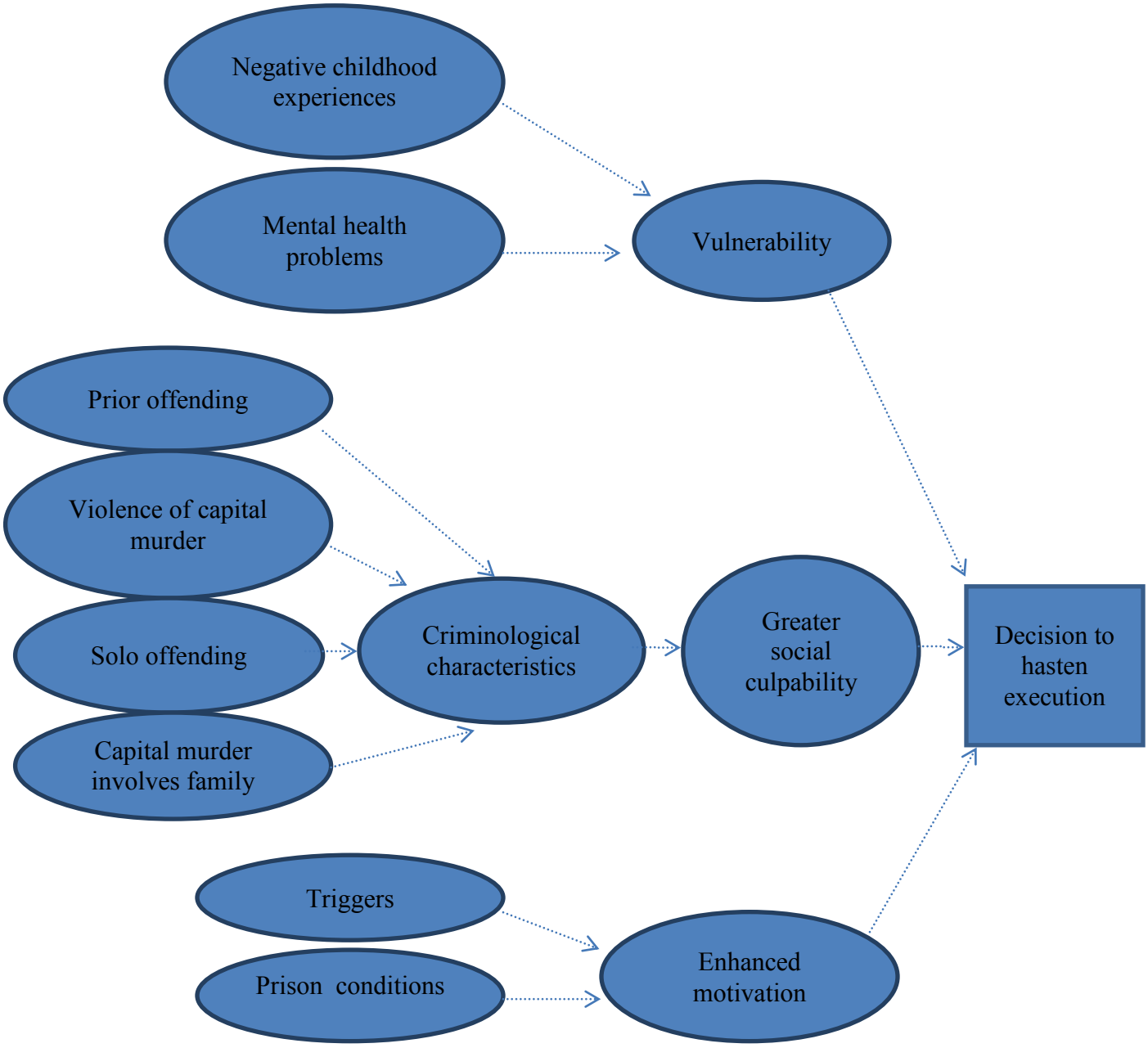

Figure 1: Proposed theoretical model.

CONSTRUCTING MEANING IN DEATH

Wray et al. complain that sociologists have neglected the "social and cultural meanings" of hastening death (2011:509). While objective indicators such as the type of prison or the number of prior convictions and characteristics of the capital crime can help us identify pathways to desires to hasten execution, how EHs explain their deaths also warrants attention. I therefore examine the subjective meanings of hastening execution to highlight the social context of the desire to hasten death (Scourfield et al. 2012). While the data may suggest that EHs in fact resemble prison suicides in important ways, their normative significance and subjective meanings may be quite different.

Jack Douglas (1967) has emphasized the importance of incorporating questions about meaning into sociological studies of suicide. Those hastening death make their decision within a certain cultural framework. As Douglas points out, there are different kinds of suicide and the ambiguity of the language of suicide reflects the ambiguity of the social meaning of suicide (Douglas 1967:248).

> There are … many shared associated terms: despair, unhappiness, life is not worthwhile, escape from harsh realities, etc. And there do seem to be certain basic dimensions of meaning for which these are slightly variant means of expression. But these terms are also clearly not *sui generis* to the phenomena themselves. On the contrary, they are terms from many other areas of experience. They are terms adopted from various spheres of experience for the purposes of *constructing meanings* for these suicidal phenomena. … *[T]here is variability, ambiguity, and conflict in the imputations of the linguistic categories, including the fundamental category of 'suicide,' (or 'suicidal') itself* (1967:247) (emphasis in original).

As Maris observed, self-destruction can be "positively valued, prescribed, encouraged by suicidal role models" (1981:xix). Decisions to hasten death among the condemned are situated within a specific cultural setting of the death penalty, and all of these acts of self-destruction involve individuals convicted of murder and sentenced to

death. This common denominator provides some idea of "the fundamental significance of the ways in which specific events, symbols, etc., are *related* by individuals to each other" (Douglas 1967:252) (emphasis in original). The acts of self-destruction in the context of the death penalty may be socially constructed as positive social acts.

In addition, the social meaning of a particular self-destructive act does not depend solely on social context. Individuals are also active in constructing the meaning of the self-destruction, which can therefore vary from the perspective of the individual.

> I would argue that the structure one finds in the meanings of specific suicidal phenomena is not given by the transmitted culture, though some of the specific meanings and criteria that make this structure possible are so given, but that the individuals involved *construct this structure of meanings*. Though the possible (or plausible) meanings of these phenomena are primarily determined by the *shared, cultural meanings* which are culturally defined as relevant to these phenomena (including the criteria of various sort) and by the *shared context of meanings given to the individuals involved by their past interactions*, the specific, actualized meanings of these phenomena will be in large measure determined by the intentional actions of the individuals involved. (Douglas 1967:253) (emphasis in original).

In striking a balance for a larger understanding of the situated meaning of hastening execution, I sacrifice Douglas' fine-grained contextual analysis, but adhere to his larger vision of "work[ing] from the clearly observable, concrete phenomena upward to abstractions about meanings" (1967:253) through careful readings of the explanations for their actions offered by EHs and those who knew them. I examine "the influence of imitation and cultural norms on the patterning of suicide rates" (Wray, Colen, and Pescosolido 2011:515), by taking into account the repertoire of cultural norms EHs draw on in explaining their decisions to hasten death.

Chapter 2

Procedural and Historical Overview of Hastening Execution

This chapter first outlines the system of appeals ordinarily pursued in Texas death penalty cases to contextualize the EHs' actions. While Texas' system has a few peculiarities – such as its "unitary" system (discussed below) and two courts of final resort (the Supreme Court for civil appeals and the Court of Criminal Appeals for criminal appeals) – it largely resembles that of other states. The chapter then describes the United States Supreme Court cases that establish the contours of the legal inquiry guiding execution-hastening, as well as particularly important Texas execution-hastening cases.

THE TEXAS DEATH PENALTY CONVICTION, SENTENCING, AND APPEALS PROCESS

If a defendant is sentenced to death, he has three principal and basically sequential avenues for appeal. This illustration represents the typical steps in a death penalty appeal:

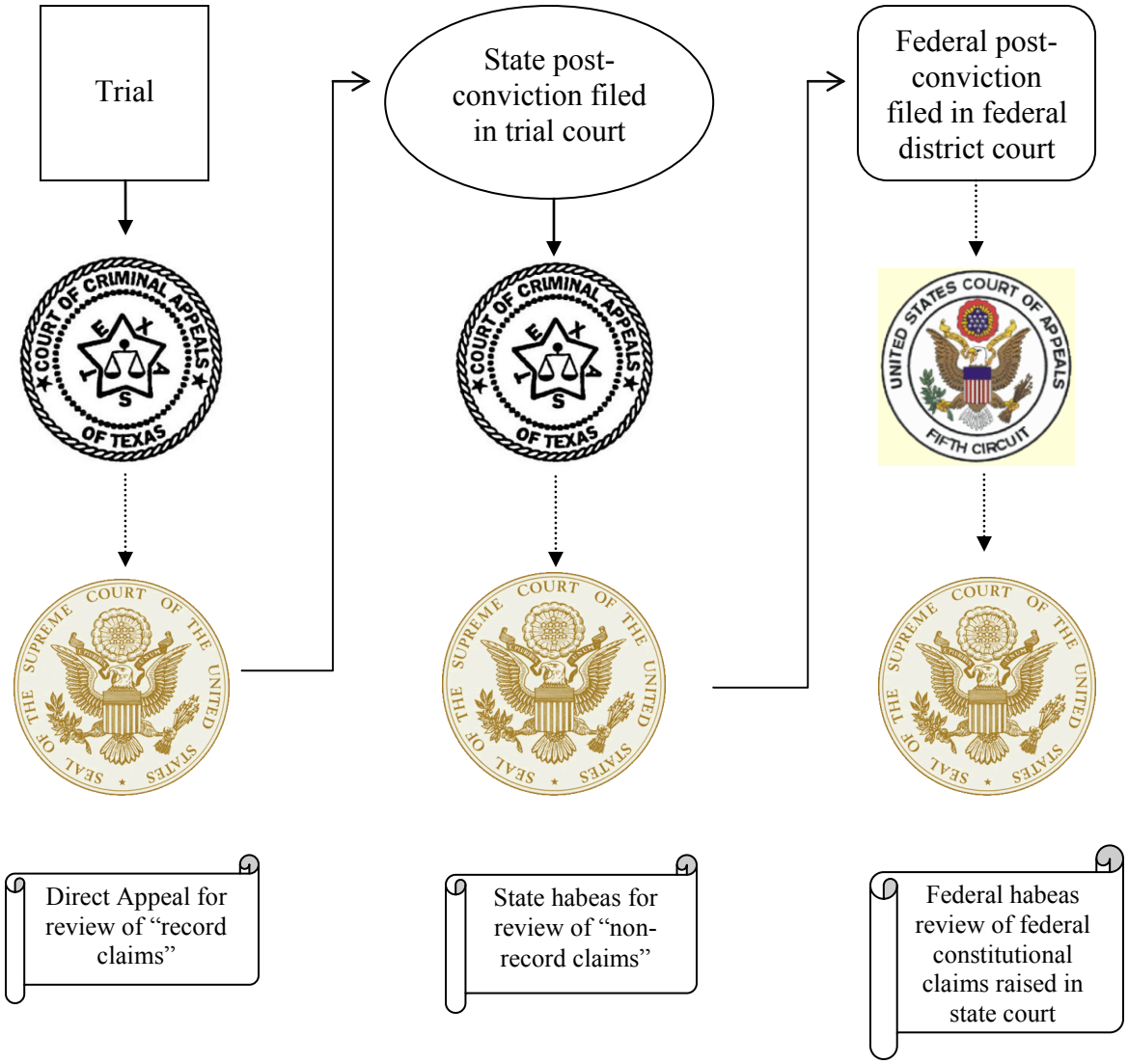

Figure 2: Structure of legal appeals.

The first appeal is called a "direct appeal," in which the prisoner typically argues to the Texas's highest criminal court, the Texas Court of Criminal Appeals (TCCA), that the trial judge made erroneous legal rulings in the course of the trial ("record claims," i.e., claims based on the court record of the case). This appeal is automatic by statute (Texas Code of Criminal Procedure (CCP) Art. 31.071 §2(h)). The appeal made directly

and automatically to the highest state court with jurisdiction over criminal cases "promote[s] the evenhanded, rational, and consistent imposition of death sentences under law" (Jurek v. Texas 1976: 276). Some of the TCCA's rulings can be reviewed by the United States Supreme Court, but such review is discretionary and rarely granted.

The second appeal, variously called a "collateral attack," "post-conviction appeal," or "state *habeas* proceeding," provides the prisoner an opportunity to argue to the state court that he deprived of a fair adjudication of his case by events outside the trial ("nonrecord claims," i.e., errors that are not reflected in the record because they occurred outside the courtroom). Typical claims allege prosecutorial suppression of exculpatory or mitigating evidence, ineffective performance by defense counsel at trial or on appeal, and/or misconduct by the jury. The trial court enters "findings of fact" and "conclusions of law" and forwards those to the TCCA for review. The TCCA then decides whether to grant or deny relief (Texas CCP Art. 11.071 §§4, 8, 9, 11). Some of these rulings can also be appealed to the United States Supreme Court, although the success rate of such requests for discretionary review is lower than on direct appeal.

The 1995 revision to Texas' state habeas procedures, among other things, instituted a "unitary" system in which the state habeas proceedings are initiated before the direct appeal was completed. Under the new statute, the state habeas petition must be filed either 180 days after direct appeal counsel is appointed – which is to occur immediately after trial – or 45 days after the State's brief on direct appeal, whichever date is later (Tex. CCP Art. 11.071§4(a)).

The final avenue of appeal essentially combines all federal constitutional claims raised on direct appeal and state habeas. These claims are presented to the federal district court in a petition for writ of habeas corpus (28 U.S.C. 2254). An adverse adjudication by the federal district court may be appealed to the federal appellate court, in Texas, the United States Court of Appeals for the Fifth Circuit. Since the passage of the 1996 Antiterrorism and Effective Death Penalty Act, federal appeals are permitted on an issue-by-issue (and no longer on a case-by-case) basis. Permission to appeal a particular legal issue must be granted by either the district court or the Court of Appeals (28 U.S.C. § 2253). If the Court of Appeals affirms the district court's denial of relief, the condemned prisoner may seek discretionary review of the Court of Appeals' decision in the United States Supreme Court. After this point, a few prisoners may have the option of filing a new, "successive" petition in state or federal court (Texas CCP Art. 11.071 Sec. 5; 28 U.S.C. § 2244(b)). Because there is no constitutional or statutory right to counsel for this kind of appeal, and because the legal requirements for obtaining review of a successive petition are even more stringent than those for succeeding in the other three types of appeals, few claims qualify and the prospects for success are slim.

REPRESENTATION BY COUNSEL

In Texas's modern death penalty era, counsel have been appointed for indigent litigants at trial, on direct appeal, and in federal habeas proceedings (21 U.S.C. § 848). Until the Texas Code of Criminal Procedure Art. 11.071 was enacted in 1995, counsel were occasionally, but rarely, appointed for Texas state habeas litigants. Prior to Art.

11.071, the State would ask the trial court to set an execution date after the TCCA affirmed the conviction and sentence on direct appeal. At this juncture, a federally-funded organization called the Texas Resource Center attempted to recruit counsel to represent these prisoners *pro bono*. (In a minority of cases, the Texas Resource Center agreed to represent the prisoner.) The execution date essentially served as a *de facto* deadline for state or federal *habeas* proceedings as prisoner's counsel asked courts to stay the execution to enable the court to hear the prisoner's claims.

The introduction of appointed counsel in state habeas represented an important juncture for the Texas history of execution-hastening procedurally, if not substantively. Where some would previously simply accept the post-direct appeal execution date and decline further proceedings, the 1995 statute created a formal juncture where the decision to be represented by counsel (and impliedly pursue appeals) is made. The State of Texas has also abandoned its policy of asking courts to set execution dates in order to expedite the review of the prisoner's case.

Fewer execution dates create fewer opportunities to abandon appeals. At the same time, the 1995 statute introduced an earlier decision-point. Art. 11.071, which governs only state habeas proceedings, provides in relevant part:

> If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus (Art. 11.071§2(b)).

In other words, Art. 11.071 established a formal mechanism to ascertain whether the prisoner desired to represent themselves and proceed *pro se*. As discussed in greater

detail below, Texas execution-hasteners commonly moved to proceed *pro se* to prevent further appeals. They would be permitted to represent themselves and then would take no further action on their own behalf. Art. 11.071 created the mechanism through which they could accomplish this.

In addition, Art. 11.071 formally designated a decision point for electing to go *pro se* that follows very shortly after a death sentence is pronounced. The court must determine "immediately" after judgment whether the prisoner wants representation in post-conviction. Art. 11.071 also increased the formality of the waiver proceedings. Prior to Art. 11.071, the prisoner's decision to waive further appeals would usually surface in the course of a hearing to set an execution date. These proceedings, while usually transcribed, at least in part, would not be reviewed by the Court of Criminal Appeals. Since Art. 11.071, the TCCA has required the trial courts to make the required findings (sometimes remanding the case back to the trial court in order to obtain those findings), and issued orders reflecting the TCCA's review of the record supporting those findings. Because the waiver of appeals is subject to appellate review, the documentation of the waiver has become more formal and centralized in the TCCA files.

COURT CASES SETTING LEGAL STANDARDS FOR HASTENING EXECUTION

Courts evaluate decisions to abandon appeals according to four criteria: the prisoner must make a knowing, voluntary, and intelligent waiver of his rights to appeal and must be mentally competent (Godinez v. Moran 1993; Rees v. Peyton 1966). These criteria are commonly applied in other parts of the criminal justice system. In accepting a

guilty plea, for example, the court engages in a (usually rote) colloquy with the defendant designed to elicit the defendant's agreement that he understands that by pleading guilty, he abandons certain constitutional trial rights (the "knowing" criterion), that he has not been coerced into giving up these rights (the "voluntary" requirement), and this decision reflects that the defendant, having been advised by counsel, understands of the charges against him and the consequences of his plea (the "intelligent" waiver) (Brady v. United States 1970).

The competency determination is the crux of the legal life of the execution-hastener. Only if the prisoner is found incompetent can others – such as parents – move to intervene as a "next friend" to continue the appeals (Gilmore v. Utah 1976; Whitmore v. Arkansas 1999; Baal v. Demosthenes 1990).

In the context of death-sentenced prisoners waiving appeals, courts also generally cite the Supreme Court's 1966 decision in *Rees v. Peyton*, which asked whether the prisoner had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises" (1966:314). In *Rumbaugh v. Procunier* (1985), the Fifth Circuit confronted a tension inherent in this standard as mental health professionals testified that Rumbaugh grasped the logical consequences of his decision, but his decision was substantially affected by a mental disease, namely severe depression. The Fifth Circuit then refined its interpretation of *Rees* by restricting the judicial

determination of competence to whether the prisoner's decision was "the product of a reasonable assessment of the legal and medical facts and a reasoned thought process" (1985:402). That this "rational decision-making process" took place within a severe depression that "contribute[d] to his invitation of death" was legally irrelevant so long as he was aware of his situation and his options (id). In other words, the court need only "inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue, and the presence or absence of mental illness or brain disorder is not dispositive" (Mata v. Johnson 2000:329 n.2).

After the Fifth Circuit's decision in *Rumbaugh*, the Supreme Court considered the case of *Godinez v. Moran* (1993), where it had to decide whether certain types of waivers required different types of mental competencies. Similar to Rumbaugh, Moran had a prior suicide attempt, "deep depression," and took psychiatric medication (Godinez v. Moran 1993:409-411). Harmonious with Rumbaugh's holding, the Supreme Court ruled that the Constitution required only a single type of mental competency, namely that the prisoner have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him" (Godinez v. Moran 1993). Therefore, it found the trial court correctly permitted Moran to plead guilty to capital murder and discharge his attorneys in order to prevent the presentation of evidence against the death penalty. Moran was:

> [C]ompetent in that he knew the nature and quality of his acts, had the capacity to determine right from wrong; that he understands the nature of the criminal

> charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter; that he knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney (Moran v. Godinez 1993:392).

The Moran dissenters protested: "the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness" (1993:409). The majority opinion noted, "[r]equiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel" (1993:402).

IMPORTANT TEXAS CASES

Two Texas cases in addition to *Rumbaugh* warrant mention. In *Mata v. Johnson*, (2000), the Fifth Circuit reversed a district court determination of competency where the district court refused to hold an evidentiary hearing and based its ruling on limited and dated information. In that case, the federal district judge found Mata competent in 1998, based on expert reports prepared in 1985. The Fifth Circuit held:

> [I]f the evidence before the district court raises a bona fide issue of petitioner's competency to waive collateral review of a capital conviction and death sentence, the court can afford such petitioner adequate due process by ordering and reviewing a current examination by a qualified medical or mental health expert, allowing the parties to present any other evidence relevant to the question of competency and, on the record and in open court, questioning the petitioner concerning the knowing and voluntary nature of his decision to waive further proceedings (Mata v. Johnson 2000:331).

Mata is important insofar as it established that a hearing to determine contemporaneous competence was required where there is evidence of incompetence. However, because so few execution-hasteners wait until federal court to waive their appeals and because most state courts conduct some kind of hearing (however problematic, as outlined in Chapter 6), the case of George Lott has had a greater impact.

In 1992, George Lott was accused of entering a Tarrant County courtroom and shooting to death two lawyers and seriously injuring three others, including two judges. After the shooting, Lott went to a local television station and gave an interview about committing the crime. A former attorney, Lott represented himself at trial. He contested his guilt, presenting a case that the eyewitnesses testifying against him were mistaken, and that his post-crime television interview simply represented an opportunistic effort to air his many quarrels with the judicial system by falsely taking responsibility for the crime. Unpersuaded, the jury convicted him and then sentenced him to death.

At the conclusion of trial, Lott indicated he would continue to represent himself on appeal. The TCCA explained the subsequent sequence of events:

> On June 1, 1993, appellant filed a motion for an extension of time to file the statement of facts and requisite affidavit. Appellant's motion was granted on June 4, 1993, and the Statement of Facts [transcript of the trial testimony] was filed on July 15, 1993. Appellant's brief was due to be filed on or before August 16, 1993. On September 10, 1993, we advised appellant that his brief had been due on August 16, and directed him to either file his brief or seek an extension of time. Having received neither a brief nor a request for an extension of time, on October 4, 1993, we ordered appellant to file his brief on or before January 14, 1994. We also informed appellant that no request for an extension of time beyond that date would be entertained, and that in the event no brief was filed on or before that date, the cause would be submitted for summary decision without the benefit of briefs. Appellant has never filed a brief (Lott v. State 1994:688 n.1).

In other words, Lott indicated he wanted to appeal and took the necessary preparatory steps. However, he failed to file a brief, even after the TCCA wrote ordering him to file a brief. It did not hold a hearing to find out why he had not filed any briefs (id. at 688 n.2). The TCCA reasoned that had Lott been represented by counsel, a hearing would have been required. Since he represented himself, none was.

The TCCA then found:

> Appellant has not filed a brief on his behalf in this appeal. We therefore submitted the case without the benefit of briefs and, in the interest of justice, reviewed the entire record. Having found no unassigned fundamental error, we affirm the judgment of the trial court (id. at 688) (footnotes omitted).

The Texas Resource Center subsequently filed an motion urging the court at least to convene a hearing at which Lott could be questioned regarding his failure to file a brief, and if necessary, to inquire into his competency (*Suggestion by Amicus Curiae that the Court, on Its Own Motion, Extend Time for Filing Motion for Reharding and Order Other Appropriate Relief*, filed May 10, 1994). The TCCA denied the Texas Resource Center's motion.

The TCCA's resolution of Lott's situation was noteworthy in at least three respects. First, the TCCA invented a new legal category – "fundamental error" – that is undefined and used in no other legal context. Therefore, it is not clear what the TCCA is looking for as it reviews the trial record for error. Second, it created a new category of non-adversarial legal review. The law already provided for a quasi-non-adversarial mechanism to review direct appeal cases that appear to have no viable legal claims

(Anders v. California 1967). In those cases, a brief must be filed that identifies possible legal errors, and provides legal argument why the law is clear that those errors do not undermine the reliability of the verdict. The appellate court considers this briefing in deciding whether to affirm the conviction and sentence. In Lott's case, the TCCA did not even have the benefit of this minimal briefing. Finally, and perhaps most disturbingly, by not requiring Lott to account for his failure to file a brief, the TCCA had no way – at least reflected in its court files – to know whether Lott may have been either mentally or physically incapable of filing an appeal. The TCCA file contains no indication that Lott wanted to drop his appeals other than his non-responsiveness to the Court's correspondence. On the contrary, it documents his efforts to prepare the record for an appeal. Before *Lott*, attorneys and prisoners believed that where the Texas statute said that direct appeal was "automatic," it meant that that briefing at that stage could not be waived. After *Lott* it was clear that was not case.

If there were any doubts of the TCCA's willingness to decide death penalty cases without the benefit of briefing, they were dispelled in Christopher Jay Swift's case. During the sentencing phase of his trial, Swift refused to permit his lawyers to present mitigating evidence, i.e., information intended to persuade the jury to sentence him to life rather than death. Swift explained to the court he wanted the death penalty because voices in his head "haunt me daily, and I feel that, you know, death is going to be the

only thing that takes them away" (*State v. Swift* RR 35:34).[3] Swift's direct appeal lawyer filed a substantial brief arguing that imposing the death penalty under these circumstances violated the Constitution. After Swift was granted the right to proceed *pro se*, the TCCA "unfiled" or removed from the record of the case the brief filed by counsel, and did not consider it in affirming Swift's conviction and sentence (Sept. 20, 2006, Order). As detailed below, the TCCA's two-page opinion in *Lott* has had significant consequences for hastening execution in Texas.

SUMMARY

There are essentially three different primary stages of appeal: direct appeal, which challenges legal rulings by the trial court; state *habeas*, where the petitioner argues that events outside the courtroom (like a cheating prosecutor or an incompetent defense lawyer) deprived him of a constitutional trial; and federal *habeas*, where federal constitutional issues previously raised on direct appeal and state *habeas* are presented first to the federal district court, and, if a court permits, to the federal court of appeals.

Until 1995, condemned prisoners were not provided with counsel for state *habeas* proceedings. Instead, a network of volunteer counsel was tapped to provide representation. State courts would use execution dates as a way to spur filing of state and federal *habeas* petitions. Since 1995, appellate counsel is appointed soon after trial, and the 1995 statute also provides the condemned the opportunity to waive state *habeas* counsel immediately after trial. Since the 1994 *Lott* decision, the condemned have been

[3] Citations to the court transcript or "Reporter's Record" are noted "RR," followed by the volume number. The Clerk's Record is referred to as "CR." For simplicity, I do not use the conventional caption of *State v. [appellant]* and *Ex parte [habeas petitioner]*, and simply cite them here by last name. "Supp. CR" and "11.071 CR" refer to Clerk's Records for post-trial proceedings. I use case captions for federal court documents.

permitted to waive adversarial review of direct appeal, the first appeal after conviction and sentencing.

In order to waive appeals, the condemned prisoner must make a knowing, voluntary and intelligent decision. He must also be mentally competent, which has been narrowly interpreted to require him to have only the capacity to understand the proceedings and, through a reasoned thought process, appreciate the logical consequences of his decision to waive appeals. The fact that mental illness contributes to the thought processes does not make the prisoner incompetent. Family members may intervene to halt the execution of an EH only if they can prove that the EH is incompetent.

Chapter 3

Study Design and Method

This is a study of condemned Texas prisoners who succeeded in hastening their execution. To be included in the study, the prisoner must have succeeded in abandoning the legal appeals conventionally pursue by death row prisoners, namely direct appeal to the TCCA, state *habeas*, and federal *habeas*. Not included in this study are death-sentenced prisoners who waived appeals and then managed to resume them in part (usually with dramatically limited legal claims). Prisoners who expressed a desire to waive appeals to courts, the media, or others but who did not act on this desire were also not included. Therefore, this study reflects a very conservative estimate of desires to hasten death among condemned prisoners and represents a relatively narrow study of EHs. A review of the files of the comparison group (that was admittedly selected to include prisoners believed to have expressed at some point desires to waive appeals, as long as they met the other sample criteria) revealed that almost of quarter of that group took some formal action to waive appeals.

DEVELOPING DATA REGARDING SUBJECT POPULATION

This study is designed as a sort of "sociological autopsy" where I examined individual case files in order to identify social phenomena (Scourfield et al. 2012). Identifying the subjects of this study was an unexpected challenge. I first searched the Death Penalty Information Center (DPIC) Executions Database (http://deathpenaltyinfo.org/executions) for prisoners executed by the State of Texas

whom DPIC coded as "volunteers." DPIC codes as "volunteers" those prisoners who waive available legal appeals. It excludes, therefore, prisoners who pursue legal remedies, but do not seek clemency. It also excludes those prisoners who abandoned their appeals at one point, but then changed their minds, regardless of whether the courts permitted them to resume their appeals (Vandiver et al. 2008).

I then reviewed court files and consulted with longtime Texas death penalty attorneys to confirm these individuals indeed met my criteria for execution-hasteners. I also asked informants whether they were aware of any other condemned prisoners who sought to waive their appeals. A few identified some who had mentioned it or who had waived one stage of proceedings, only to pick them up later. Newspaper reports sometimes provided leads. In covering the execution of one EH, they might mention others as historical background. Case citations would sometimes signal a prisoner's decision to abandon appeals. In general, however, legal database searches of court opinions in Texas were poor sources of information regarding execution-hasteners. As discussed in greater detail below, many abandoned their appeals in state *habeas* proceedings. Any orders from the trial-level courts interacting with the prisoner would generally not be included Westlaw, the legal database I used. Until 1995, these decisions were not even reviewed by the TCCA. Even now, when the TCCA does review these decisions, it issues one or two page orders affirming the trial court's factual findings and legal conclusions about the waiver of appeals. Neither these orders nor the trial courts' rulings are generally reported in Westlaw. Further, whether a prisoner forfeited a stage of review and then managed to resume his appeals may not be explicitly noted in any opinion or order submitted to electronic legal research databases.

Based on my criteria – that the prisoner succeeded in waiving his conventional course of appeals and was executed without resuming those appeals – I eliminated one prisoner listed by DPIC (Peter Miniel) because, as mentioned above, this man decided against "successor" litigation, which is not routinely pursued by Texas death-sentenced prisoners. I ultimately included two individuals, Danielle Simpson and Robert Streetman, apparently excluded by DPIC because they tried at some juncture to reinstate their appeals. I considered it appropriate to include them in this study because their wavering appears to have occurred only after last minute intervention of new lawyers specialized in death penalty litigation. These lawyers are generally taught to oppose client efforts to waive appeals (Inf. 20:4). In addition, what the prisoners ultimately wanted is hard to discern in the heat of litigation under the pressure of an execution date.

Through the NAACP Legal Defense Fund publication "Death Row USA" and professional networks, I also identified two other prisoners (Richard Foster and Robert Anderson) who abandoned their appeals, but were not listed as "volunteers" in the DPIC execution database. A complete list of my subject population, as well as of my comparison groups, is provided in the Appendix. Based on this research, I concluded 31 prisoners had been executed by the State of Texas after abandoning their appeals.

Once I identified the prisoner as a subject, I requested the file from either the Texas State Library and Archives Commission or the TCCA. Those files had to be reviewed on-site. This is not a perfect system. At least two cases appear not to have been recorded, making them unfindable. In Jeffrey Barney's case, the TCCA listed a

cause number for a *habeas* action, but appears to have no file associated with it. (I ultimately examined Mr. Barney's file in the trial court.) According to a federal court opinion, Charles Rumbaugh filed a habeas action to stave off next-friend litigation, but the TCCA had no record of it. James Smith's file appears to have been lost. (I was able to piece together the file from the Texas Resource Center documents at the Dolph Briscoe Center for American History and next friend's counsel's file.) Fortunately, the more recent case files are more systematically maintained.

In reviewing the files, I took detailed, often verbatim notes. Depending on the complexity of the case (often associated with the age of the case), my summaries ranged from three to 44 single-spaced pages. Occasionally, I made copies of particular proceedings. I did not read carefully every document in every file, but I looked at every loose page in the file. In addition, I read certain documents that regularly yielded useful information. If any of those documents suggested anything of interest in another part of the file, I would read that other part of the file.

More specifically, in examining the court file, I read five basic sets of documents. I reviewed the docket sheet that logs all trial events. This document alerted me to unusual events, as well as the pedestrian. Through docket sheets, I learned of James Smith's suicide and escape attempts during trial and that "Defendant [Robert Atworth] sentenced to Death at 7:10 pm. Defendant laughed during sentencing" (CR 7). I was particularly attentive to any remarks involving the defendant. Notes that the defendant

testified or made requests in the courtroom sometimes reflected efforts by the defendant to, e.g., proceed *pro se* or circumscribe the presentation of evidence.

Another critical source of information was the "Clerk's Record," a compilation of all the official court documents filed at trial. In addition to containing the docket sheets, the Clerk's Record (CR) includes all the motions filed in the court and the court's orders. Sometimes the CR contains mental health reports. I took very careful notes on these reports not only to gain some appreciation of how the defendant appeared to a mental health evaluator at the time, but also to get a more general sense of what the defendant was like outside the more constraining court proceedings. The CR would also sometimes contain handwritten motions and letters from the defendant. These could provide some clues about the defendant and what he wanted out of the trial. I would also review the index of documents in the CR to have some sense of how aggressively litigated the case was. I ultimately decided not to code for this, concluding that the fact that a case was not aggressively litigated did not reliably indicate that the defendant did not want an aggressive defense. It might have simply reflected poor performance by counsel.

I also looked at the appellate briefs to get a sense of the type of crime that had been committed and any unusual events at trial. In addition, I used the State's brief to corroborate my understanding of the defendant's criminal history since that was usually an important part of its statement of facts of the case.

I scanned transcripts of court proceedings (the "Reporter's Record" or RR) for instances when the defendant spoke or testified. I would read more closely pretrial

proceedings because, as these are not conducted in the presence of the jury, judges seemed more likely to address the defendant directly, if only to ask, e.g., whether he had any complaints about his representation. Defendants would sometimes use this time to raise grievances with or make requests to the judge. In addition, I read mental health testimony in both the guilt/innocence and punishment phases of the case, as well as the punishment phase case, particularly any testimony from close friends or family members. I scanned trial exhibits to see whether they contained any writings by the defendant. If the file contained documents regarding mental competence at any stage, I read those documents closely.

A surprisingly rich source of data came from a manila folder contained in almost every file. The folder would have the case number handwritten vertically on the front flap. This folder contained correspondence between the court reporters and lawyers and the court regarding extensions of time. I often found correspondence from EHs in this file asking for appeals to be halted. (Christopher Jay Swift was sufficiently prolific to have an entire manila folder for his correspondence.)

In addition to noting the substantively interesting contents of the documents, I created a timeline of the case based on these documents. This timeline included information such as the date of the offense, the date of trial, the periods of jury deliberations, filing of appellate briefs and opinions, court orders, correspondence from the prisoner, any competency or waiver court proceedings, execution date, etc. I also noted the names of individuals who might have information about the prisoner.

Where I had reason to believe the Archives or TCCA files did not reflect all the litigation surrounding the waiver,[4] I examined files maintained by the trial court and accessible to me, but I did not review all trial court records in each case. When I learned, e.g., that Richard Beavers had undergone some kind of competency evaluation, I went to Harris County to review that file. (I would learn of these events through interviews and/or media coverage.)

My access to federal court files was considerably more limited because of the relative inaccessibility in the federal archives.[5] For federal court proceedings, I either obtained transcripts of the federal court hearing, reviewed the court orders disposing of the prisoners' request, or read media coverage.

For each member of the subject population, I also conducted LEXIS-NEXIS news searches usually with their names and "Texas," and sometimes "murder" and/or "capital," depending on the results. In addition, for both the subject population and the comparison group, I conducted google searches by the prisoner's name and "Texas Death Row" and "Texas execution." I relied heavily on two sites that routinely aggregated TDCJ information, news stories and press releases from the Attorney General's Office – txexecutions.org and clarkprosecutor.org. In addition, I used TDCJ's website on "Executed Offenders" and Bill Crawford's *Texas Death Row* (2006), which compiles certain public information on executed Texas prisoners. Most of Crawford's information

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[4] Prior to 1995, for example, records regarding waiving appeals would not necessarily be in the TCCA files.

[5] Fortunately for this project, and as discussed below, the overwhelming majority of these prisoners sought to hasten their executions while in state court.

repeats the information available on the TDCJ website, but it fills certain gaps, including, for example, written final statements. The TDCJ site and Crawford's book, which is based on TDCJ information is not without mistakes and omissions. If the sources disagreed, I used information from the court files. Through open records requests to TDCJ, I obtained lists of execution witnesses for the EHs, and whether they were buried in the prison cemetery.

I also conducted 30 semi-structured interviews with individuals who knew one of my subjects, and had briefer conversations with three other in lieu of an interview. I was not able to interview someone in connection with each subject. The interviews averaged a little over 62 minutes, and were conducted in person at a location of the interviewee's choosing or by phone. I obtained an informed consent from each informant pursuant to the terms of the University of Texas's Institutional Review Board Protocol Number 2010-04-0068.

CREATING THE COMPARISON GROUPS

Matched Sample One (MS1)

I created two comparison groups. First, I selected a sample of prisoners (Matched Sample 1 (MS1) (n = 73)) who had been executed, but not as a result of abandoning their appeals. I identified prisoners who entered TDCJ's death row within six months of the individual subjects. I then selected two to four of the same race and closest in age for each subject. (One EH, Christopher Jay Swift, had no one of the same race entering death row within six months of his arrival. Therefore I selected no match for him.)

Where there were multiple possible matches, I selected those convicted from counties similar in geographic location or urban development to those of the subject. I recorded information regarding prior convictions, educational attainment, and social contacts at the time of execution from TDCJ's website, court opinions, txexecutions.org, and other news sources. I obtained information regarding execution witnesses and burial through Open Records Act requests to TDCJ.

Matched Sample Two (MS2)

In addition, I reviewed media coverage and parts of the court files of at least one of each group of matches associated with an EH that I developed in MS1. I selected this subset of MS1 – Matched Sample 2 (MS2) (n=38) – with particular attention to characteristics that appeared to recur in the EHs' files, namely whether the match confessed to the crime,[6] ever sought to waive appeals, and/or had any history of depression and/or suicide.

I reviewed portions of the court files for MS2, following a protocol substantially similar to that followed with the subject population. The main difference in the comparison is that I generally did not review trial transcripts for MS2. Since I had identified the main variables of interest, and since information on those did not generally require reviewing the trial transcript, I did not think that was necessary. Also, since these individuals had gone through more appeals, more information from their trials was

[6] I initially speculated that confessions might be tied to efforts to abandon appeals. After finding that many in both the subject and comparison groups confessed, and that coding the variations in types of confessions (contradictory, partial, etc.), was very challenging, I abandoned this consideration.

available in the appellate briefs and post-conviction *habeas* petitions. Therefore, for this group, I reviewed the docket sheet, the CR, the appellate briefs, state post-conviction petitions, the manila court correspondence file, and all loose documents in the file. In these documents, I was looking for information on prior criminal history, experiences with incarceration, descriptions of the offense, any information regarding mental illness (including depression), suicidality, childhood neglect or trauma, juvenile delinquency, and any efforts to waive appeals.

CODING QUALITATIVE DATA

As Bowker and Star (1999) make clear, all coding is a social construction. Analyzing the explanations prisoners gave for their desire to drop their appeals was necessarily an interpretive process. In conducting this study, I was not able to enhance the reliability of my findings through the assistance of another coder. That said, I have read and re-read the data on multiple occasions, separated by significant stretches of time. In addition, I used conventional qualitative techniques intended to enhance the reliability of my findings. I created a set of categories based on multiple re-readings of the different accounts. I then used Atlas.ti to code them. Through the process of coding these categories were refined (Creswell 2003; Esterberg 2002). Once I had derived my categories, I used Excel to code and calculate these results as well as the data from interviews and media reports. I was attentive to the possibility of different categories of meanings in the press and other information sources. Indeed, after reviewing these other sources, I refined the "autonomy" category to distinguish between assertions of a right to

choose to hasten execution (generally asserted in court) and a desire to exercise control over one's life.

LIMITATIONS ON DATA

Finally, to clear out the underbrush of limitations of this study, I note first the most obvious: the small population. Second, the data sources each suffered from various imperfections. With the passage of time, interviewees not surprisingly forgot detail that can bring out important nuances. In addition, and also not surprisingly, I came to believe that their memories were often as informed by their own theories of why the subject had chosen to hasten death as by their memories, a phenomenon noted by other researchers. Scourfield et al. observed that reasons for suicide attributed by others were sometimes rooted in "common sense assumption that [those were] an understandable reason for a suicide" (2012:469). Douglas reflected that memory may selectively retain "socially and personally *meaningful*" information (1967:259) (emphasis in original). One interviewee, for example, confidently and vigorously asserted that a particular prisoner had sought execution because he could no longer bear the oppressive prison conditions. When I asked for an example of the kinds of things he complained about, the informant affirmed that the prisoner never spoke or wrote about his conditions of incarceration.

Contemporaneous documents, namely court files and news articles, offered more detail, but they too suffered from unreliability. One news story reported that a man confessed to committing a terrible murder because he sought to return to prison. A subsequent psychiatric interview with the man revealed that he had been hallucinating at

the time of the crime, but realized after the fact that he would return to prison because of what he had done. Documents in court files, while in many ways the best sources of information, varied in their richness depending on the quality of counsel and the legal issues salient at the time of the litigation. For example, before Texas jurors were permitted to consider evidence of mental impairments for any purpose other than future dangerousness, defense lawyers had few incentives to investigate and develop evidence of mental dysfunction.

That said, some patterns readily emerged despite these limitations. Further, these methodological frustrations forced a useful shift from more individualistic and psychological concerns to a sociological and sociolegal analysis.

PROFILE OF SUBJECTS

All of Texas's EHs were men. Whites made up 64.5% (20) of the EHs; 22.6% (7) were Latino, and 12.9% (4) were African-American. White EHs constitute 9.2% of whites executed; Latino EHs constitute 8.5% of Latinos executed; and African-American EHs constitute 2.3% of African-Americans executed. This ranking, if not the proportions, resembles Vandiver, Giacopassi, and Turner's findings that, nationally, 17.6% of whites executed were EHs; 12.9% of Latinos executed were EHs; and 1.7% of African-Americans executed were EHs (2008:181). The Texas' EH proportions might be lower simply because Texas' rate of execution is so much higher than the national average and because the state-level numbers are relatively small.

Age

EHs entered TDCJ at an average age of 31.4 years. Those with a prior prison record averaged 32.6 years old; those without were an average 29.1 years old when admitted to TDCJ. This may reflect simply that they did not have as much time in the free-world as the older EHs to be arrested, convicted, and sent to prison before committing their capital offense. If those offenders whose capital crimes were tied to domestic crises are removed from the group without any prior incarceration, however, the average age at reception of those without a prior record drops to 24.4 years old.[7] This group, which is **not** restricted to those who killed their intimate partners, is referred to as IPV-EH and discussed further below.

I also calculated the average age at which EHs expressed their desire to die, even informally, and the age at which the EH took a formal action intended to expedite his execution, whether by instructing his attorneys to select death penalty oriented jurors, limit mitigating evidence, asking the jury for the death penalty, or writing the court asking for an execution date. Calculating this age is fraught with complication. Some ages are estimates based on when certain pleadings were filed and execution dates set. Some reflect interview recollections, some of which may have been self-serving insofar as they may have reassured the interviewee that s/he had done all s/he could to urge the prisoner to stay alive. Others are reflected in court transcripts or correspondence with the court. With those caveats, I present information regarding apparent ages of waiver.

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[7] Among those with a prior criminal record, the age at reception remains the same, even after the three IPV-related offenders (average age 35) are subtracted.

About a third (32.3%) of EHs desired to waive their appeals when they were in their 20s, and 48.4% desired to waive when they were in their 30s. The following reflects the overall age distribution of EHs' desire and action to waive appeals.

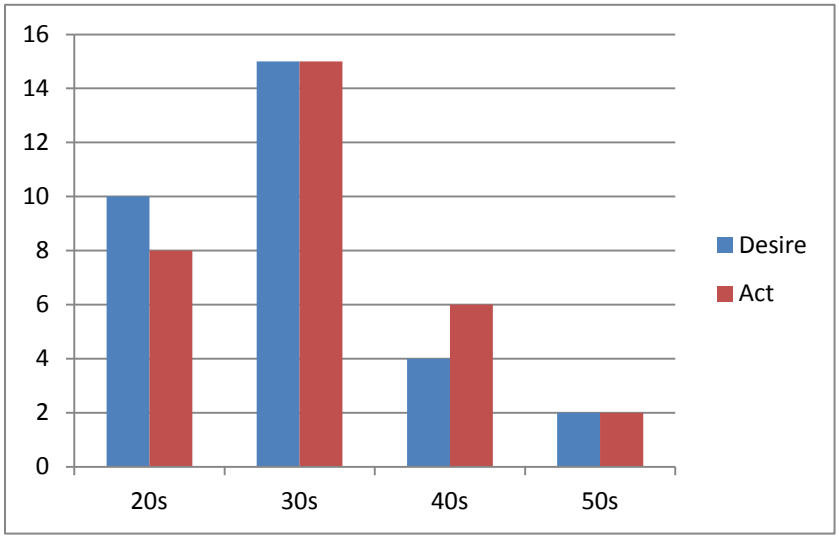

Figure 3: Distribution of ages at which expressed and acted upon desire to waive appeals.

While the numbers are small to be sure, breaking them down further offers possible insights into the dynamics of waiving appeals. Excluding the EH-IPV, for example, EHs were 32.7 years old on average when they expressed the desire to abandon appeals, and 33.9 years old when they acted on that desire. Non-IPV EHs with no prison experience expressed their desire to waive appeals on average at age 27.1 and acted upon it, on average, at age 27.6.

	Average age desire expressed	Average age action taken
Overall	33.8	35.1
EHs w/o IPV	32.7	33.9
IPV-EH	37	38.5
EHs w/o IPV & no prior prison experience	27.1	27.6

Table 1: Ages at which desire expressed and action taken to waive appeals.

This finding is consistent with the literature finding that most prison suicides are committed by those less than 35 years old, and that most murder-suicides involving spouses are committed by older men.

Vandiver and her colleagues also calculated the percent of EHs according to age at execution nationally (2008:191). These data are less revealing because age at execution can be beyond the control of the prisoner – it may depend, for example, on efforts by others to contest competency to waive appeals or the aggressiveness of the State in setting an execution date – but for the purposes of comparison, I offer the following findings of the proportion of the overall executed population that hastened execution.

Age at execution	National	Texas
20s	17.9%	13.2%
30s	11%	5.7%
40s	10%	6.7%
50s	14.9%	3.6%
60s	3%	0%

Table 2: Age at execution, percent EH nationally and in Texas.

The different proportions, particularly for those in their 50s, may reflect state-based variation, including how long prisoners remain on death row before they waive appeals. In Texas, only three EHs lived on death row for more than ten years. Robert Anderson, Richard Foster, and David Martinez lived on death row for about 12-14 years. Four others (Banda, Brimage, Rumbaugh, and Simpson), lived on death row for about nine years.

Educational attainment

EHs' average educational attainment[8] was very slightly higher than the non-EHs' education attainment (grade 10.2 v. 9.8), with 10 years of education being the median number for both groups. Of those with more education, 16.1% (5) of the EHs had 12 years of schooling, and 9.7% (3) had more than 12 years of education. By comparison, 14.9% (11) had 12 years, and 12.2% (9) of MS1 had more than 12 years of school.

Education	EHs (N=30)[9]	MS1 (n = 73)
Average	10.2 yrs	9.8 yrs
Median	10 yrs	10 yrs
12 years of education	16.1% (5)	15.1% (11)
More than 12 years	9.7% (3)	12.3% (9)

Table 3: Educational attainment.

[8] Consistent with TDCJ, I used only the last grade completed by the incoming prisoner. Where TDCJ did not have the information, in the case of the EH, I derived the information from court documents. I assigned 13 years for all who had more than 12 years of education, in part to avoid the complexities of, e.g., assigning a value to number of college credits.

[9] Information regarding Stephen Morin's education level was unavailable.

PART TWO

Chapter 4

Pathways to Hastened Execution

This Part outlines the findings regarding the three primary domains identified in my proposed theoretical model: vulnerabilities, criminological characteristics, and motivation enhancements.

VULNERABILITIES

As outlined above, both popular narratives of hastening execution and empirical work on both prison suicides and execution-hasteners identify mental illness as a contributor to decisions to hasten execution. In addition, research on prison suicide suicide suggests that negative childhood experiences such as parental neglect, delinquency, and psychiatric treatment elevate the risk for suicide. The problem, of course, is that death row prisoners as a whole have a high incidence of both bad childhood experiences and adult mental dysfunction. By comparing the EH group with a group of similarly situated death-sentenced prisoners, this is the first study to take into account this population's already high risk for deciding to hasten death.

I coded as "1" any individual whom court records revealed had childhood experiences with adjudications of delinquency, time in juvenile detention, foster care, early drug use, and/or chaotic childhood environments. I found roughly similar proportions of childhood trauma and dislocation between the EHs and MS2. Within MS2, 47.4% had some indicator of personal vulnerability; of the EHs, 43.8% did.

Again relying on court records, in both groups, I coded whether the prisoner had ever been believed to have been depressed or suicidal. While proportionately more EHs

experienced depression at some point during their lives, and/or had some kind of experience with suicidal ideation or attempt, overall, they are not so different from the comparison group with respect to other mental illness.

	EHs (N=31)	MS2 (n=38)
Effort to waive?	31	9
Prior suicide attempt or ideation	51.6% (16)	42.1% (16)
Depression	54.8 (17)	42.1 (16)
Suicidal ideation or attempt + depression + waiver attempt		8
Suicidal attempt or ideation + depression w/o waiver attempt		6

Table 4: History of suicidality and/or depression.

As Blume (2005) has noted, other forms of mental illness can elevate the risk of suicide. With respect to other kinds of mental illness, members of MS2 also score high, with 10[10] reportedly diagnosed with a mental illness or having a history of psychiatric hospitalization. This is higher than the prevalence of mental illness other than depression among the EHs. Swift was diagnosed with schizophrenia; Hayes with manic depression; Porter with PTSD and depression with psychotic features; Foster with PTSD. Beavers

[10] Robert Black, James Colburn, James Collier, Kenneth McDuff, John Moody, Paul Nuncio, Michael Perry, Lamont Reese, Angel Maturino Resendiz, Larry Robison.

had periods of psychiatric hospitalization. I have not found a diagnosis for James Smith but have heard him described as psychotic. He had previously had a criminal charge dismissed based on insanity.

Certainly, many of the EHs were motivated to suppress information regarding mental illness, as discussed in Chapter 6. The court records may well understate the prevalence of mental disorder. Court records are also problematic sources of information because their quality depends in large part on defense counsel's diligence in obtaining historical information about the client, having the resources required to conduct a comprehensive investigation, and counsel's strategic decisions about what information to elicit. These data support the general proposition that death row prisoners on the whole are a psychologically vulnerable group. The connection between these vulnerabilities and hastening execution is less clear.

CRIMINOLOGICAL CHARACTERISTICS

The theoretical model also connects certain personal involvement in crime and types of crimes to decisions to hasten execution.

Criminal history and experiences with incarceration

Prison suicide researchers have found that prisoners convicted of violent crimes were at a higher risk of suicide. The death penalty can be imposed only in cases involving a homicide; therefore all had been convicted of murder. In order to explore possible differences between EHs and non-EHS, I created an index of criminality to gauge EHs' prior experience with criminal offending and the criminal justice system that was weighted toward a propensity to violence, as measured by convictions for crimes against persons. To maintain consistency with TDCJ practices and therefore the

comparison groups, I excluded juvenile and misdemeanor adjudications, and included only adult felony convictions.[11] In a few instances (namely Stephen Morin, Richard Foster and Ynobe Matthews), the prisoners were convicted of additional offenses after they were sentenced to death for offenses they committed prior to their capital murder trial. I included those offenses in their criminality score, though not in calculating prior crimes against persons. I assigned one point for the first felony, with two points added if the prisoner had any additional felonies. Each crime against a person was assigned two points. The EH criminality index had almost a "W" distribution.

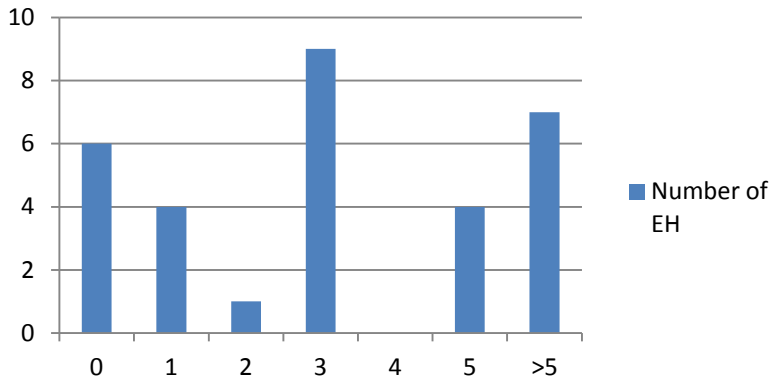

Figure 4: Distribution of execution-hastener prior conviction scores.

I found that relative to the comparison group, EHs had a higher criminality index score and were generally more likely to have been previously convicted of a felony. MS1 was created in part by selecting comparably-aged prisoners, which diminishes the relevance of their age, but it did have a slightly younger average age – two years younger than the EHs. This could account for MS1's relatively lower prior criminal involvement.

[11] Texas capital sentencing trials routinely include evidence of any prior bad acts committed by the defendant, whether or not those allegations were proven in a court of law. I did not include these so-called "unadjudicated offenses" in my count to be consistent with TDCJ practices, but also because they are potentially unreliable (East v. Johnson 1997).

MS2, which was selected from MS1 to include individuals believed to have sought to waive appeals, however, also had greater incidence of crimes against persons than matched sample as a whole (MS1).

	EHs (N=31)	MS1 (n = 73)	MS2 (n=38)
Average criminality index	3.4	2.2	2.3
Median	3	1	2
No prior convictions	19.4% (6)	34.2% (25)	34.2% (13)
No prior CAP convictions	48.4% (15)	68.5% (50)	60.5% (23)

Table 5: Criminal history comparison.

This finding is consistent with the prison suicide literature connecting prior offending with an elevated risk of suicide.

I also coded whether the EHs and sample groups had any history of imprisonment. (I did not include time in jail.) EHs were somewhat more likely to have prior prison experience, and this possible characteristic is echoed in the sometime-EHs in the comparison group. Nineteen EHs had some prior experience with incarceration; 12 had none. In MS2, 20 had prior prison experience, and 18 had none; 36 of MS1 had

previously been in prison and 37 had not. Of the nine in MS2 who sought to waive in the course of the legal proceedings,[12] five had been previously incarcerated.

	EH (N=31)	MS1 (n=73)	MS2 (n=38)	MS2 waverers (n=9)
Prior Prison Exp.	61% (19)	50.7% (37)	52.6% (20)	55.6% (5)

Table 6: Prior prison experience for execution-hasteners and comparison groups.

These data suggest that EHs on average have more prior experience with incarceration.

Characteristics of capital crime

Intimate partner conflict related homicides

Another story is possibly hidden by these overall EH numbers, however. The literature indicates that those who kill their intimate partners are at higher risk for suicide. Separating those EHs who committed a capital murder in connection with a domestic crisis reveals their path to waiving appeals may be somewhat different. Eight[13] of the 31 EHs committed their offense in connection with a domestic dispute. This category includes not only those who murdered their intimate partners, but also those who committed murder ostensibly because of a domestic crisis. For instance, when Eliseo Moreno's brother-in-law refused to disclose the whereabouts of Moreno's wife, Moreno murdered the brother-in-law, sister-in-law, and four others. Robert Anderson attributed

12 Robert "Bob" Black, Jeffrey Doughtie, Michael Lockhart, John Moody, Robert Morrow, Jessie Joe Patrick, Angel Maturino Resendiz, Larry Robison, and Douglas Roberts.

13 Robert Anderson, Larry Hayes, George Lott, David Martinez, Eliseo Moreno, Steven Renfro, Benjamin Stone, and Christopher Jay Swift.

his murder of a child to an argument he had had that day with his wife over her infidelity. She had told him that he needed to leave their house before she returned home (Graczyk 2006). George Lott is believed to have shot up a courtroom in order to express his upset with its handling of his divorce and child custody proceedings (and perhaps his stress over an upcoming trial on charges that he had sexually abused his child) (Walt 1994).

The IPV group's criminal experience was lower than the other EHs, whether measured by their prior convictions, crimes against persons, or time in prison.

	EHs (N=31)	Non-IPV EHs (N=23)	IPV-EHs (N=8)
Prior conviction index	3.22	3.48	2.5
No prior convictions	19.4% (6)	17.4% (4)	25% (2)
No prior CAP convictions	48.4% (15)	47.8% (11)	62.5% (5)
No prior prison	38.7% (12)	30.4% (7)	62.5% (5)

Table 7: Execution-hasteners' criminal experience breakdown.

Commission of crime

Compared to MS1, the EHs were more likely to have used a gun in the murder,[14] and less likely to have committed the crime with another person. This difference remains even after the IPV-related offenses are excluded. (All of the IPV-EHs acted alone; half used a firearm.)

[14] Some offenses involved multiple weapons. I coded simply whether a gun was fired at the victim(s).

Offense	EHs (N=31)	MS1 (n=73)
Involved firearm	61.3% (9)	49.3% (36)
Involved co-participant	29% (9)	49.3% (36)

Table 8: Domestic crisis-related offense characteristics.

Vandiver, Giacopassi, and Turner (2008) found a statistically significant relationship between the number of homicide victims in the capital offense and the likelihood of dropping appeals. Texas EHs also appear to have this relationship.

	National	Texas
One victim	9.6% (78)	5.7% (23)
Two victims	17.7% (36)	10.9% (5)
Three or more victims	23.7% (9)	16.7% (3)

Table 9: Percent EH nationally and in Texas of execution-hasteners and number of victims.

There are two problems with these measures, however. First, Vandiver and her colleagues looked at the number of "victims for whom the death sentence was imposed" (2008:193). At least in Texas, the actual number of homicide victims may exceed the number for whom the death sentences was imposed. For example, Eliseo Moreno killed

six people in the course of a single (if protracted) crime spree. However, he was tried and sentenced only for the murder of the police officer who was killed during this string of homicides. While including him in those EHs with three or more victims increases the apparent significance of this statistic (largely because the numbers are so small), at the same time it highlights that we do not know the actual number of victims of the others executed. They too may have been convicted on the case for which it was easiest to obtain the death penalty, rather than the number of homicide victims related to the capital offense.

In addition, other dynamics may be at work. For example, seven of the eight EHs who killed more than one person in the course of committing their capital offense were IPV-EHs. What appears to be an association between number of victims and a desire to hasten execution may reflect (in whole or in part) the uxoricide trajectory described above.

ENHANCED MOTIVATION

Timing and triggers

Informants and court files generally indicated that EHs' had long-standing desires to hasten execution. To the extent informants had known other death row prisoners, these EHs were unlike those others precisely because of their steadfast desire to be executed. Nonetheless, records indicate that more than two in five (22.6%) reportedly went back and forth in their desire, whether because of outside pressures from lawyers or family, or

because of an internal struggle. (Jeffrey Barney, Richard Beavers, David Martinez, Scott Porter, Michael Rodriguez, Danielle Simpson, and Robert Streetman are in this group.)

Lawyers play some role in staving off waivers, at least for a time. The case files reflect some prisoners' frustration because their lawyers were ignoring their instructions to waive appeals. Richard Smith wrote the Harris County District Attorney:

> Sir,
>
> I ask that you help me in my effort to drop my appeal.
> I've ask my attorney back in Nov. 98, to do this for me.
> As of this date I've not been ordered back to court to drop my appeal.
> I've called my attorney Guy L. Womack and spoke to him by letter. I'm being stalled.
> I wrote Judge Godwin & Guy L. Womack. Please help me (letter to Johnny Holmes, 4/21/99)

Some lawyers reportedly temporized when receiving these kinds of requests, asking for more information, sending books to distract, and sometimes trying to help "the underlying sources of [ ] pain and frustration" (Inf. 66:1; Inf. 44:11; Inf. 20:5). Michael Rodriguez, apparently wanted to hasten execution, but did not want to disappoint his attorney by halting appeals.

> She's always knew that it was in the back of my mind of foregoing any appeals, and at her behest she's – she's a wonderful person. She's very nice and she started crying, saying please let me enter the state habeas and then we'll talk again. What happened is after the state habeas finally got affirmed, I told her, I said, 'Lydia, you're done now,' and I said, 'If you were any other person I'd tell you to, you know, you're fired, go away,' but she was such an endearing person that I let her talk me into it, and back for me, she knew that I was always going to vacate federal. When the time came she said, 'Now we're going to federal court,' and I said, 'No, we're not; we're done,' and that's when she filed a motion to the court, I believe it was to this court, about a conflict of interest….She stepped down, but she stepped down because she could not accept that I would not go into federal court (August 22, 2007 hearing, 53-54).

Beavers, Streetman, and Simpson were all represented (at least at the end) by death penalty lawyers affiliated with specialist death penalty organizations in their final appeals. This may account for their sometime decisions to resume appeals. David Martinez, who said he deserved the death penalty in his confession upon arrest, would subsequently maintain his innocence. This public stance may have curbed his desire to hasten execution, at least for a time. (In his final statement, he acknowledged responsibility.) Further, as detailed below, some prisoners who indicated privately that they accepted the death penalty at trial would themselves raise legal claims while on appeal. This could indicate wavering, or, as argued below, some other psychosocial processes.

The crime

Informants never identified any triggers common to research on suicide such as the breakup of a significant relationship. To the extent EHs' decisions were triggered by any event, it may have been the crime, conviction, and/or sentence may have provided the enhanced motivation. Most EHs decide to abandon appeals very early in the criminal process, a finding that is consistent with the literature on prison suicide.

Related to the commission of the offense, the anniversary of the capital crime could be an important triggering event for some. Some prisoners experience trauma from the crime they committed; Robert Anderson said he had frequent powerful dreams involving his victim. He reportedly told the court in the course of his competency

hearing that "The victim in my case has appeared to me at several times in various stages of the assault" (McBride 2004). Using only those cases where the prisoner took an action, such as filing a *pro se* motion or writing a letter to the court to drop appeals, I found the following:

Anniversary of Offense	Defendant's Act
Within four or fewer weeks	38.9% (7)
Within eight or fewer weeks	27.8% (5)
Within twelve or fewer weeks	11.1% (2)
More than twelve weeks	22.2% (4)

Table 10: Effort to waive around the time of the anniversary of the crime.

Therefore, two-thirds acted to waive appeals within eight weeks of the anniversary of the offense.

The appeal

Other junctures could also trigger action. Foust indicated he waived his appeals only after arriving on death row because he learned there that he could do so (Graczyk 1999), but others appear more specifically legal. Like Rodriguez, several EHs decided to abandon appeals after an opinion rejecting their legal claims, or at the beginning of a new stage of appeals (e.g., Brimage, Jenkins, Morin). Not counting the two EHs who

represented themselves throughout trial and on appeal (and who therefore did not have to ask the appellate court for permission to waive), and those for whom the record is not clear, 57% of 21 EHs acted within one to eight weeks after an important court action, and over 80% acted within 12 weeks.[15] While some of the court records do not provide complete information, this table illustrates the span of time between a court action and an act intended to waive appeals. (The data regarding the anniversary of the offense are provided for comparison.)

Court Action	Defendant's Act	Anniversary of Offense
Within four or fewer weeks	38.1% (8)	38.9% (7)
Within eight or fewer weeks	19% (4)	27.8% (5)
Within twelve or fewer weeks	23.8% (5)	11.1% (2)
More than twelve weeks	19% (4)[16]	22.2% (4)

Table 11: Effort to waive after court action.

This could be simply an example of deciding to end their lives after bad news, but it could also reflect a more complex phenomenon. It could manifest instead an effort to stop appeals before some new process began that the prisoner felt may be difficult to halt.

[15] It is generally not possible to ascertain when the prisoner learned of the court action.

[16] Three of these acted more than seven months after the court action. One acted within 14 weeks.

In this passage, while the prisoner is cut off, one could infer that what he meant by "too late" was that the lawyer had filed the state *habeas* petition:

> Attorney: During the time when i was representing you on your state writ [for *habeas* relief], did we talk about whether to proceed with it or to dismiss it?
> Porter: Yes.
> Attorney: What did you want me to do at that time?
> Porter: At one point to proceed.
> Attorney: At one point to proceed.
> Porter: And then to drop, to stop it.
> Attorney: And when did you decide to, did you decide during the state process you wanted to drop it?
> Porter: Yes.
> Attorney: But I didn't do that, did I?
> Porter: **I think it was too late. You had done --**
> Attorney: I tried to talk you out of it.
> Porter: Yes (January 30, 2004, 27) (emphasis added).

The end of one phase and the beginning of another could be seen as an opportunity to intervene to prevent the perpetuation of "lies" (Rodriguez (Graczyk 2008); Hayes (Kimberly 2003); Beavers (Associated Press 1994); Cook (Grazcyk 1993)).

Benjamin Stone appears to have been driven by profound shame and embarrassment. One person recalled:

> [I]t was more he just really didn't want-. It's like, if you do something really bad and you just don't want to think about it. And if you appeal, you're just focusing on it and focusing on it. And he just said, let's just forget about it. I did it. Let's forget about it. Let's move on. The only way he could do that-. If I remember it, he didn't really want to have a trial or anything (Inf. 73:2, 7).

In addition to requiring the prisoner to think about his appeal, legal junctures often occasion increased media coverage. A prisoner could choose see abandoning appeals as a way to avoid this unwanted attention.

The importance of legal junctures could also reflect a kind of contingency-based thinking, and indeed, some informants believed this was the case for certain individuals. If, for example, the jury handed down a death sentence, the prisoner would abide by their decision. "He said, if the [ ] jury finds that I deserve the death penalty, then so be it" (Inf. 62:2). Other EHs may have wanted to give up to avoid future disappointments. One informant thought the EH he knew changed his attitude after losing his appeal, and was mad at himself for getting his hopes up (Inf. 8:18). Leo Jenkins, who won his case on direct appeal, only to have the TCCA reverse itself on rehearing, lost all faith in the judicial system. "[H]e was in a state of no matter what you do, you just can't get anybody to listen to you. I'm tired of this. That's the state of mind he was in" (Inf. 93:3).

When asked what specifically the EH was tired of, the informant elaborated on the toll the process of litigation takes:

> Just the daily grind. Death row is an emotional roller coaster. It has a lot of ups and downs. One day you might get good news and then turn around next week and tell him that news is no good anymore. Today you might get a letter from your lawyer saying that you're going to have a hearing on an issue that you're hoping to get it on. And then next week, you might out the hearing is canceled. A lot of ups and downs, ups and downs, just pulls and tugs at your heart all day. You get tired of that. Especially those who have done something but don't think they deserve to be on death row for what they've done. They just get tired of the pull and tug at their emotions that they just don't want to do it no more. Just give up (Inf. 93:3).

A legal event might galvanize a prisoner to action, if only to stop the "pull and tug at their emotions." The appellate process, above and beyond life on death row and individual adverse court decisions, can contribute to uncertainty and anxiety.

The process could be stressful not only because of the ups and downs of litigation, but also because it involves waiting. Robert Atworth explicitly complained about the

stress of waiting. In asking to waive his appeals, he told the court that "[t]here's nothing anyone can say to get me to change my mind unless, of course, I was told I would have to sit down there for an extended period of time to wait which I don't see the Court and certainly not the DA's Office making that effect [effort?] (May 12, 1999 hearing, 11). Atworth explained to the court:

> Atworth: [The prosecutor] Mr. Shook has made comments about six months to a year, probably somewhere around six months. That sort of time – I think you could appreciate, since I am here to initiate this process myself, **that that sort of time to sit with a weight of a date over your head and to look at the calendar every day and dwell on that, well, I think the anxiety would kill me before the State would.** So my only concern is time.
>
> Judge: You just want me to set a date as soon as possible? Is that what you're saying?
>
> Atworth: Within reason. I think I'm going to need about six to eight weeks to, you know, wrap up my personal affairs. But **anything beyond 60 days I think would be rather torturous** (May 12, 1999 hearing, 7) (emphasis added).
>
> Charles Rumbaugh wrote a friend:
>
> [I]f they were to come to my cell and tell me I was going to be executed tomorrow, I would feel relieved, in a way. The waiting would be over. I would know what to expect. To me, the dying part is easy; it's the waiting and not knowing, that's hard" (Stubben 1980:215).

The motivational force of waiting exposes the absence of distraction on death row, another particular pain of imprisonment, and not one confined to the isolation confinement at Polunsky.[17]

[17] Both Atworth and Rumbaugh hastened their executions while at Ellis.

Others' efforts to hasten execution

Researchers have observed that suicides can occur in clusters, which is sometimes referred to as a "contagion" effect (Nock et al. 2008). This raises the question whether one individual's decision to hasten execution could affect others. Blume (2005) found contagion could be a dynamic affecting decisions to hasten execution. My data question that finding insofar as the bulk of my subjects sought to hasten execution before they even got to death row.

More importantly, however, using execution dates to measure contagion is problematic given that the length of time between a decisive step to hasten execution and the execution itself can vary. Groups of prisoners executed at around the same time may not have acted around the same time to halt their appeals. This table, based on some of the prisoners[18] identified by Blume as reflecting a possible contagion effect, sets out this information graphically.

Execution-Hastener	Date of Step Hastening Execution	Date of Execution	Time Difference in Months
Foust	6/98	4/99	10
Tuttle	12/97	7/99	19
R. Smith	4/99	9/99	5
Atworth	3/99	12/99	9
Gonzales	11/95	9/96	11
Brimage	11/96	2/97	3
Stone	6/96	9/97	15

Table 12: Dates of execution as compared to dates of steps to waive appeals.

[18] While I believe Jenkins, Hernandez, and Moreno first acted to waive their appeals when they were given an execution date after they lost their cases on direct appeal, this is an inference from other material in the file. Therefore I do not include them in this table.

Further, the dates I have are based on correspondence to the court, which is likely after the prisoner made up his mind. Some of the EHs limited evidence that could be presented at trial, or instructed their lawyers to select jurors who favored the death penalty. Richard Smith wrote his lawyers in November 1998 – soon after receiving a learning he had cirrhosis and Hepatitis C[19] – but subsequently contacted the court when they failed to act. Therefore, the time gaps recorded in Table 11 are likely underestimates.

I want to stress, however, that these data do not lead me to reject the contagion hypothesis. Inclinations and desires may well have been reinforced once they got to death row. Therefore, attention to decision points rather than execution dates may yield more useful information.

Beavers, Lott and Cook all took steps hastening execution within a three month period in late 1993. Both Beavers and Cook were highly religious, and Beavers is believed to have been part of a very religious group of white men from East Texas that included Cook (Inf. 13 pt. 1:12''39).[20] One individual also believes that he talked to one about the other, reinforcing the possibility that they knew of each other's inclination to waive appeals (Inf. 13 pt. 1:49''19). Another described Cook as "consistent," "enthusiastic," and "charismatic" (Inf. 25: 1"46; 2"24).

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[19] TDCJ Clinical Notes from November 23, 1998 put into the court record in the course of Smith's appeal waiver proceedings reflect: "He has cirrosis [sic] and Hepatitus [sic] C – feels he is terminally ill, and wants to ask for a date for execution. He says he wants to avoid the pain of execution rather than die of natural causes."

[20] Interviews with Informants 13 and 25 have not been transcribed, so the references are to the time the statement was made, rather than to the transcript page number.

Stone and Brimage acted within five months of each other, and Porter and Matthews within a month of each other. While Stone and Porter certainly seemed highly motivated to hasten execution during trial, they could have conceivably have influenced Brimage and Matthews, respectively. (Foster and Hayes also decided within about six months of each other.) At least on Ellis, at least some prisoners knew of others giving up appeals. A news report from Morin's execution recounts:

> A group of inmates seeking quick executions for themselves pointed to Morin as supporting their effort.[21] "The principle of our action, he agreed with," said James Smith, who is among about 10 inmate who desire to have all appears dropped and their executions carried out (Associated Press 1985).

One informant suspected chaplains told prisoners about other prisoners contemplating giving up appeals (Inf. 13 pt. 1:12"47, 49"44). This could also provide a contagion pathway.

Death row culture, however, could operate as a brake on contagion by stigmatizing those who express a desire to hasten execution. Prisoners may feel some reticence about discussing their desire to drop their appeals because "if someone does something like that, it spreads like wildfire" (Inf. 93:3) to other death row prisoners who generally disapprove of the decision. One former prisoner interviewed in connection with this study initially suggested compassion towards those considering hastening execution.

Q: How would you describe people's attitudes about giving up appeals?

A: People understand. That's the thing. People can't say, you're wrong. People

[21] Morin was Texas's first prisoner to hasten execution.

> can't say, you're a coward. Because they understand. And more likely, they've had the same thought, they just didn't follow through with it. And it's all because of the way you're living. You're living less than human. You're being treated like an animal. And some people are just tired of it. So when someone talks about dropping their appeals, even though it's something I wouldn't do, but I'll say-. What can you say? Because you know the conditions that you're living under. And they're harsh. And some people, after fifteen, twenty years decide, I can't do it no more. And they're looking at another five or ten years down the road and still it's possible that they're going to get executed. So they say, why wait? (Inf. 93:3)[22]

Later in the interview, however, he related a harsher reality.

> Q: Do you remember either at Ellis or Polunsky, did people talk openly about giving up their appeals?
>
> A: No, not really.
>
> Q: Why not, do you think?
>
> A: Because **it's a sign of weakness. And that's not what you want to display in that type of environment.** So that was something you discuss with your attorney or with someone you had gotten really, really close with. But it wasn't an open conversation. **Because when you show a sign of weakness in that place, you're preyed upon.** People take advantage of the weak in there just like they do out here. So that wasn't a place to go around showing your weaknesses. So you kind of kept those things close to the vest. You share that with your attorney. Family member. If you shared with anyone down there, it was someone you had grown extremely close to.
>
> Q: Would it be seen as weak because it was a sign that you sort of had no spirit or you weren't prepared to defend yourself? What was weak about it?
>
> A: **Just giving up on your life, giving up on yourself. That's the weakness.**

[22] As described earlier, no successful Texas EHs was on death row for this long. The three EHs with the longest stints on death row were on death row for about 12-14 years, most of which was spent at Ellis. Four others (Banda, Brimage, Rumbaugh and Simpson) were on death row for about nine years and all but Simpson never lived on Polunsky. Informant 93's perspective may reflect a difference between most of those who abandon their appeals and those who struggle with occasional despairing thoughts and feelings while living on death row. These may reflect the transient desires to hasten death more commonly experienced by those living with terminal illness.

> **It's one thing when other people give up on you. But when you give up on yourself, that shows a big weakness. In the man. Shows he has no spirit, no courage to continue to fight.** You see that person and say, I would never want to be with him in a foxhole. Because when the bullets start raining down, he might throw his gun down and come out with his hands up and we both get killed. You don't want to deal with that person. So that's why that person definitely wasn't going to tell anybody. It's a sign of weakness. **What man gives up on himself unless he's a coward?** That's the thinking. Even though you understand because you're living under the same conditions. It's just they you have a fighting spirit. This guy here, he just don't want to fight. So that becomes a sign of weakness. And as I say, people prey upon the weak (Inf. 93:7-8)(emphasis added).

Inhibiting discussion of waiving appeals could complicate the contagion effect.

Legal structures

The law also channels the ability of prisoners to act upon their desire to waive appeals. The data indicate that almost 55% expressed a desire to waive appeals during trial or on the first appeal after conviction. This is a conservative figure as the data do not include information regarding some of the oldest cases, where information has been harder to come by. The fact that so many sought to abandon their appeals during state postconviction may well reflect the fact that until the TCCA's 1994 *Lott* decision, this was the first stage at which condemned prisoners were permitted to discharge counsel and waive appeals.

	Desire	Act
Trial	45.2% (14)	16.1% (5)
Direct appeal	9.7% (3)	12.9% (4)
State postconviction	32.2% (10)	51.6% (16)
Federal habeas: district court	0% (0)	6.4% (2)
Federal habeas: Court of Appeals	12.9 (4)	12.9% (4)

Table 13: Desires and acts to waive appeals.

Legally required adversarial testing of the conviction and sentence may also create a space for prisoners to commit to their appeals. For example, Charles Rumbaugh and Richard Beavers, both of whom indicated a willingness to accept the death penalty at trial, filed *pro se* supplements to the direct appeal briefs (Rumbaugh CR 111; Beavers 4/30/90 *pro se* supplemental brief). This could reflect a certain wavering in their desire for the death penalty, but it may also have reflected a sense that if they had to go through this legal review, they might as well speak their piece.

After the TCCA permitted George Lott to waive all adversarial testing of this convictions and sentence, patterns of execution-hastening change. Previously, appeals generally followed this sequence:

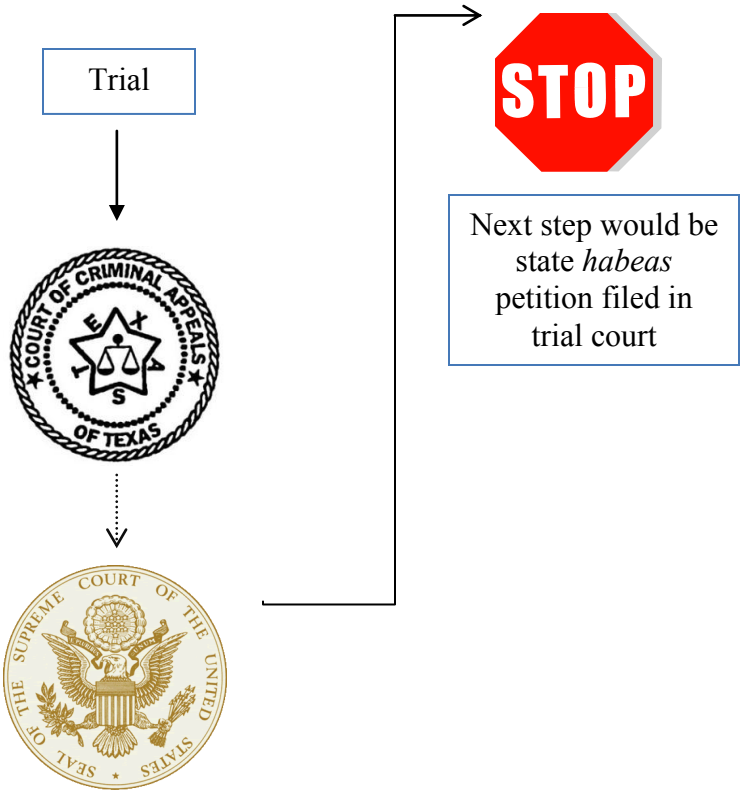

Figure 5: Pre-*Lott* appeals process.

After *Lott*, adversarial proceedings could end at trial.

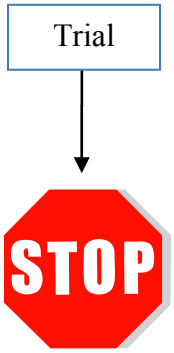

Figure 6: Post-*Lott* appeals process.

This figure shows the patterns of appeals prior to *Lott.*

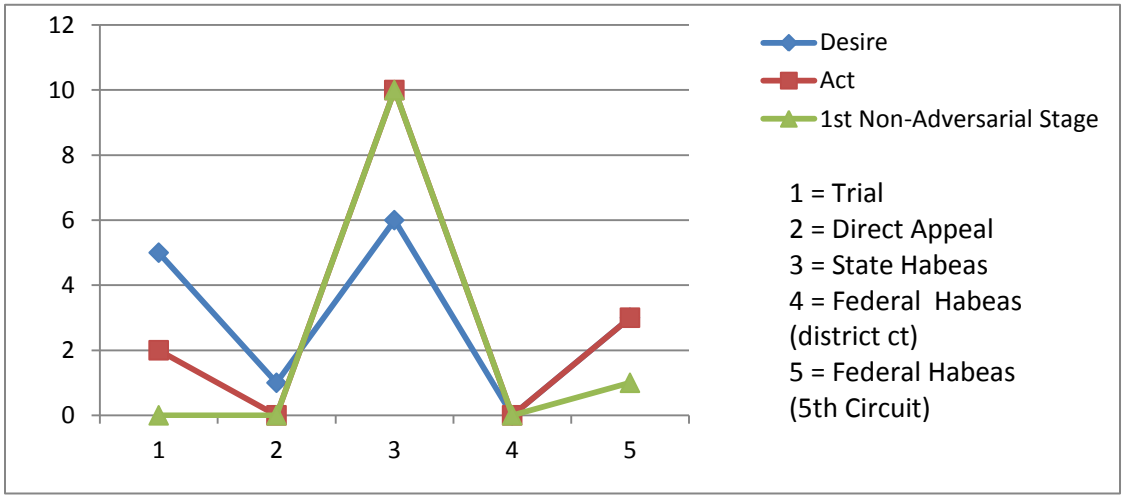

Figure 7: Desire, Act, First Non-Adversarial Stage pre-*Lott* (N = 15).

The majority of EHs waived appeals after the end of direct appeals, even though some wanted to hasten execution before this stage.

This figure shows the distribution after *Lott*.

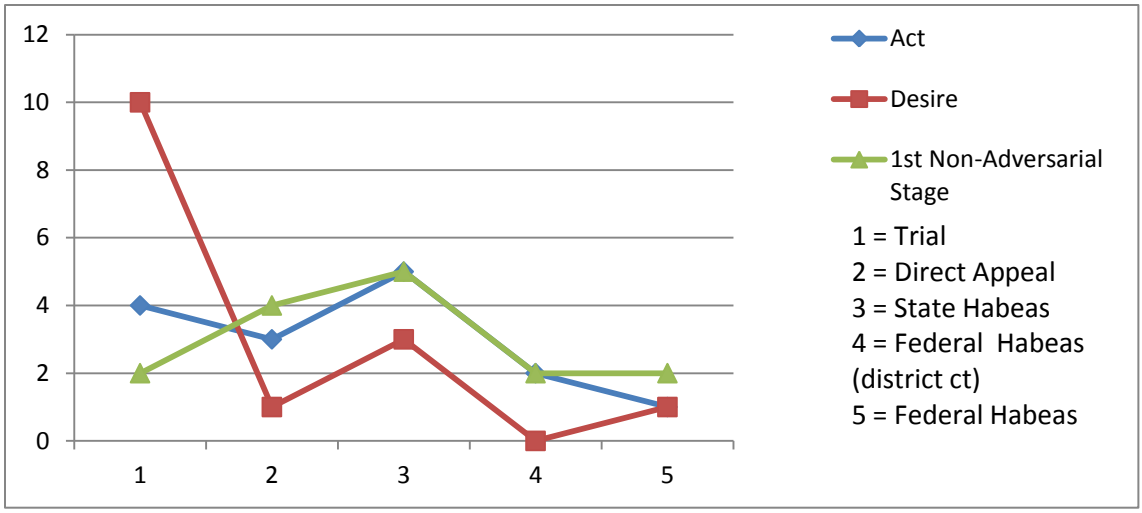

Figure 8: Desire, Act, First Non-Adversarial Stage post-*Lott* (N=15).

More EHs waived earlier in the process. As a result, fewer convictions and sentences were subjected to adversarial scrutiny. While *Lott* does not account for the substantial increase in defendants who took some step to increase the possibility of execution at trial, it introduced more post-trial variation on when EHs act and possibly on when they desired to hasten execution.[23] In addition, it enabled fewer adversarial proceedings. These figures suggest that when they are allowed to, some EHs will waive even a single legal review of their trial.

The dramatic difference in the time spent on death row also suggests the impact of *Lott*, at least in part.

[23] The differences in trial-level desire for the death penalty may be an artifact of the formalization of the legal process. Lawyers may now be putting this information on the record where they previously did so informally.

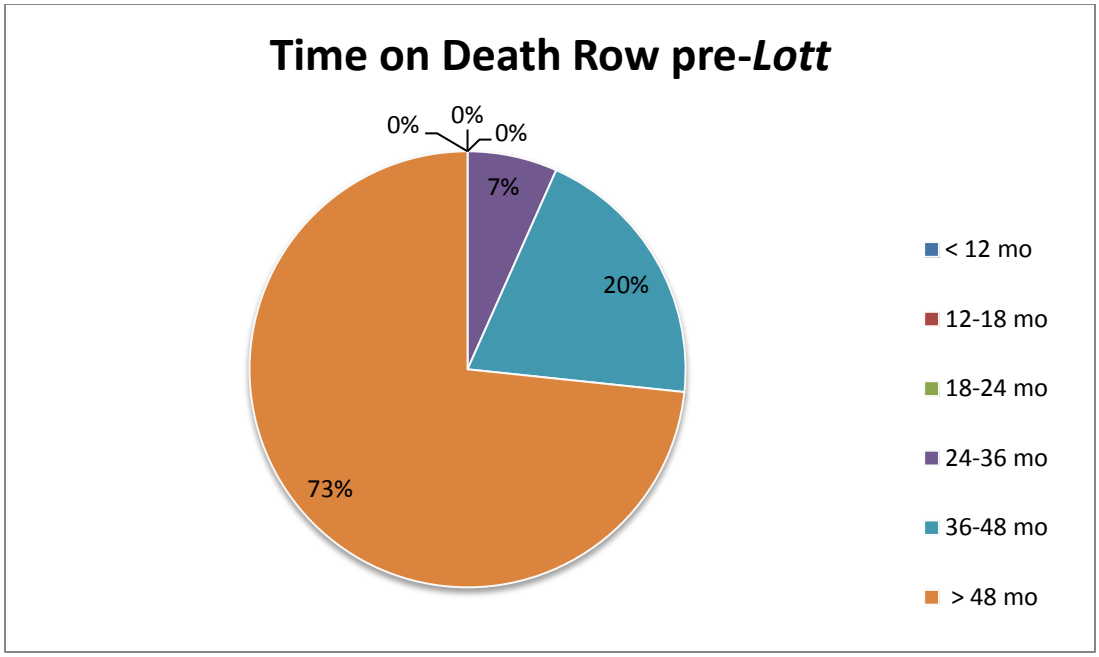

Figure 9: Time on Death Row for execution-hasteners convicted prior to *Lott*.

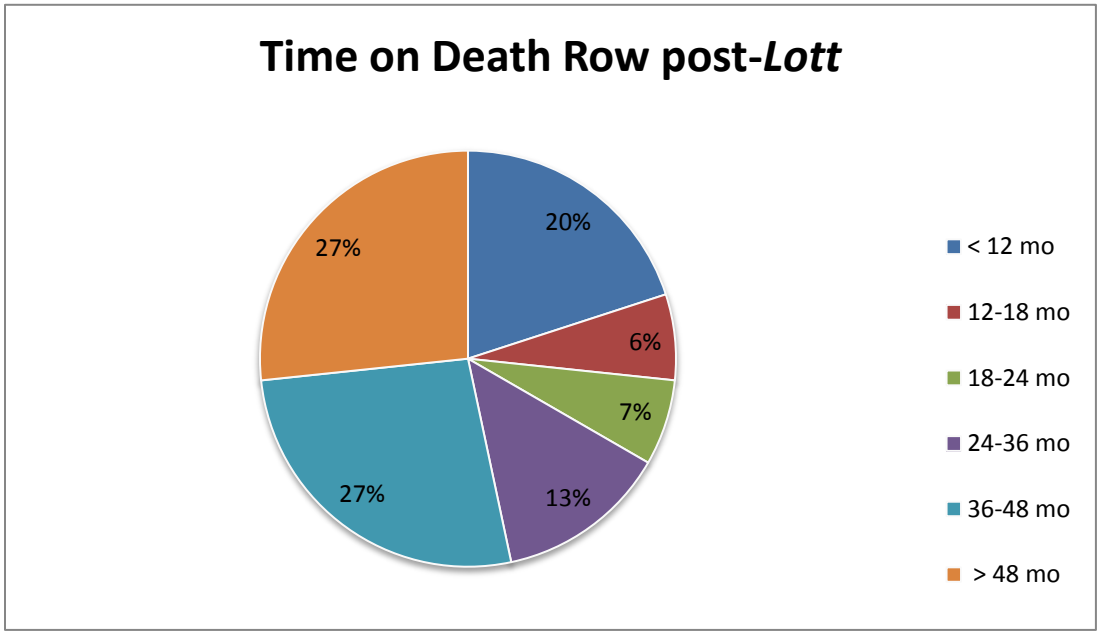

Figure 10: Time on Death Row for execution-hasteners convicted after *Lott*.

These figures show that the proportion of time on death row has essentially been reversed. Where 75% of EHs prior to *Lott* spent more than 48 months on death row, after *Lott*, only 27% did.

Prison conditions

Move into segregation

This area yielded the most incomplete information regarding individual adjustment,[24] yet it is an area of the most significant structural changes in the lives of Texas' condemned men. Until 1999, the men's death row was housed at the Ellis unit in Huntsville, Texas, one of the oldest prisons operated by the Texas Department of Criminal Justice (TDCJ). After a Thanksgiving 1998 escape attempt by a small group of death row prisoners, TDCJ decided to move[25] the men's death row to Polunsky,[26] a newer facility in Livingston, Texas. TDCJ moved death row to Polunsky over the course of 1999 to a building in the Polunsky complex that was designed to hold difficult or dangerous prisoners (such as gang members).

The architecture does much of the work of controlling the prisoners as they live in conditions of what is generally called "administrative segregation," the contemporary

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[24] Informants generally had or remembered little information regarding whether the EH had been involved in productive activities on death row. A few informants recalled instances of group activities and some news accounts related that a particular EH or another was involved in Bible study on death row, but it generally was very difficult to get a sense of the daily lives of the EHs.

[25] TDCJ denies the escape attempt precipitated the move, citing instead the fact that the death row population was growing larger than Ellis's death row could house (The Victoria Advocate 1999).

[26] This facility was originally named Terrell, but was subsequently renamed Polunsky after Charles Terrell objected to having a death row on a prison bearing his name (Yardley 2001).

version of solitary confinement. All prisoners are housed in single cells with solid doors. The only time a prisoner leaves the pod is to meet outside visitors in a neighboring building. While they can communicate to prisoners in nearby cells by yelling or passing notes and small items on a string slid from cell to cell, they are otherwise isolated from other prisoners in every aspect of their lives. They eat alone, recreate alone, and worship alone. Depending on their disciplinary record, they are permitted from 3-12 hours per week of solitary out-of-cell time in larger recreation cell, and can have from 2-8 hours per month of non-contact social visits with people from outside the prison. They have no access to television, and only the best behaved prisoners can own a radio. Since moving to administrative segregation, death row prisoners participate in no educational, work or other structured activities of any kind. This is a stark contrast to the conditions at Ellis, where death row prisoners engaged in a range of activities, including working in the garment factory, making handicrafts, group recreation, and congregate activities like religious worship and Bible study.

Certainly more EHs and death row prisoners generally complain about the daily stress of life on death row at Polunsky as compared to Ellis. While my data are insufficient to distinguish between EHs and non-EHs with respect to prison stressors, the change in institution toward a more highly segregated environment could theoretically contribute to higher rates of execution-hastening.

Based on annual tallies of Texas' death row population (Carson 2012)[27], I found that, starting in 1982, the year of the first EH, 1.06% of those executed while on Ellis were EHs. Of those arriving at Ellis between January 1, 1982 and January 1, 1999, 3.28% were EHs. Measuring the Polunsky period as beginning on January 1, 2000, I calculated that of those executed between January 1, 2000 to January 1, 2011, 3.6% were EHs. Of those arriving at Polunsky between January 1, 2000 and January 1, 2011, 4.39% were EHs. Not included in the Polunsky statistics are the three prisoners (D. Martinez, Foster, and Anderson) who had lived on Ellis, but decided to hasten execution after the move to Polunsky.

	Percent EH of those executed	Percent EH of those received
Ellis	1.06%	3.28%
Polunsky	3.6%	4.39%

Table 14: Comparison of percentage of execution-hasteners of those executed and received while at Ellis and Polunsky.

In other words, there is some support for the hypothesis that increased segregation has increased the proportion of prisoners seeking to hasten execution. The significance of this finding, however, should not be overstated as other factors could confound this finding. While happening prior to the move to Polunsky, the Anti-terrorism and

[27] Unfortunately these data include the approximately 17 women sentenced to death. These women live on a separate death row in Gatesville, Texas.

Effective Death Penalty Act of 1996 (AEDPA) threatened to sharply curtail federal court review of the prisoners' state convictions. While not all commentators agree that the AEDPA has in fact had such a dramatic impact (Blume 2006), at the time the AEDPA passed, many thought it would. Further, Texas was particularly active in executing prisoners in the late 1990s, peaking in 2000. Even though executions peaked prior to or around the time of the move to Polunsky in 1999, prisoners may well have been reacting to these increases in executions, whether because they had no reason to believe rates of execution would drop or because they had only a generalized sense that more people were being executed.

Informant 93 also introduced another possibility in discussing the stigma and physical threat risked by those who discussed waiving their appeals. The EH may become socially marginalized on death row at best, and victimized at worst since he is "weak" and therefore "prey." While this may inhibit the contagion effect by discouraging other prisoners from pursuing the same path, for those prisoners who enter prison committed to hastening execution, they may not be able to integrate into death row because of the stigma associated with their desire to abandon appeals.[28] At the same time, Polunsky's segregation could increase rates of hastening execution since the cost of marginalization decreases with the diminished opportunities to interact socially and segregation lowers the chances of victimization.

[28] Alexander Martinez referred obliquely to the social risk of hastening execution in his final statement: "And thanks for the friends at the Polunsky Unit that helped me get through this that didn't agree with my decision - and still gave me their friendship" (TDCJ Executed Offenders 2012).

PROTECTING AGENTS

Texas's men's death row has enough of a group culture to create and enforce norms about hastening execution. This culture may also moderate some of the effects of living in administrative segregation. Unlike some administrative segregation regimes, they do have some ability to communicate with one another by shouting cell to cell or from the dayroom to a facing cell. Correctional officers would sometimes carry legal materials from one cell to another, and the prison has conjoined legal visit cages that keep two prisoners separate but permit them to discuss their legal cases (Inf. 93:19).

Informant 93 acknowledged the new prison imposed limits on social interaction, but prisoners still eke out some meaningful group activity:

> Polunsky, it was hard to do a lot of things together. But what we would try to do, we would read a book. A couple of us would talk about it. Just to try to get a better understanding. We liked history. We tried to pay attention to politics down there. We used to love listening to Amy Goodman on Democracy Now. And we would go out and talk about it. We'd try to come together-. Those type of things. Talk about the death penalty, any changes in the death penalty (Inf. 93:17).

In addition, the men's death row engaged in some group protest activities.

> Conditions were just so bad, you feel like, they made you come together. Because the condition was just that bad. You have people come together, want to protest. What we would do as a protest, we would not go to rec. Everybody would decide, we're not going to rec. That's what the opposite like, [inaudible] have to do the work. But still, this was our way of showing solidarity. We might refuse a tray. We're not going eat off the food cart. Just trying to show some solidarity. When someone gets executed, we give a moment of silence. We don't eat off the food cart that day, we don't talk. We try to remember the person that was being executed. Those are moments of solidarity for us (Inf. 93:17).

Restrictions on core concerns like visits or food created opportunities for demonstrations of solidarity that overrode racist and other group affiliations.

> Q: You said too that everybody was aware that there are different cliques and groups, but when there is a serious moment, everyone come together to get what needs to be done.
>
> A: Yes. For example, if the food comes on the wing and it's dehydrated. Just sitting there and plugged up with all this heat on it. By the time you get it, everything is dried out. No matter who's on the wing, no one wanted that food. And we knew by the rules that they were not allowed to serve us that. So we would all refuse the try. It might start with me. And I might say, this food is dehydrated. Don't take those trays. Make them take it back. And it doesn't make a difference if it's AB [Aryan Brotherhood] over there or whatever clique it is. Once they hear that, we don't want that, take that back, bring us something else. Then that's when we come together (Inf. 93:18).

Texas prisoners also have ties to the free-world. While imperfect proxies of the condemned's connectedness to others, data from the Texas prison system regarding witnesses to executions indicate that most execution-hasteners had some social ties to the outside world. Of the 29 execution-hasteners on whom I have information from TDCJ, 27 invited witnesses to their execution, and of those, 25 had witnesses other than clergy or attorneys. In addition, of 30 execution-hasteners, only five are buried in the prison cemetery. Burial in the prison cemetery – where they are buried under their prison number, and not their name – is generally anathema to prisoners, who see it as the prison owning them even after their death. Being buried elsewhere means that almost all execution-hasteners had relationships with people outside of prison strong enough that individuals committed to collecting their bodies and making arrangements to bury them privately.

Based on these measures, MS2 appears to have had had greater social connection. Out of 37 for whom TDCJ had information, five were buried in the prison cemetery, and

only one had no personal witnesses. Only two had only death row spiritual advisors and/or attorney witnesses.

	Execution Witnesses	Lawyer/prison clergy witnesses only	Buried in prison cemetery
Execution-hasteners	89.6% (26)	6.9% (2)	17.2% (5)
Non-hasteners	97.3% (36)	5.4% (2)	13.5% (5)

Table 15: Comparison between groups of execution witnesses and burial arrangements.

Prisoners may have had important social relationships not reflected in these data, however. Anthony Cook, for instance, had only his spiritual advisor (who had previously witnessed several executions) present at his execution, but his mother, step-father, brother, sister, in-laws, and cousins joined the spiritual advisor at the funeral home after the execution (Blaustein 1994). Cook was also buried in the prison cemetery. This may reflect that his family simply could not afford the cost of paying to bury him. Moreno had no one from his nuclear family as witnesses to his execution, but in his final days, he visited with his mother, brothers, first wife, and their four children (Bragg 1987). At the same time, it is not uncommon for family with whom the prisoner has had little to no contact to resurface at the time of execution.

As with those with terminal illness, family ties may both inhibit and motivate desires for hastened death. Some EHs believed they would spare their families pain by hastening execution. As Informant 93 said, "they don't want to put their family through it no more" (Inf. 93:1). Moreno, according to his attorney, "did not try to block the

execution because he did not want his family to despair. He wanted to get the execution behind them" (Freelander 1987). Gonzales, who represented himself at trial and asked for the death penalty, rejected an opportunity to plead to a term of years because he did not want to put his family through the experience of his incarceration (RR3:12). Robert Atworth raised a subtler point. He did not express concern about the burden imposed on families coming to visit on death row, or the ignominy or shame that the crime brought to the family. Instead, he seems to have been unhappy that he was disconnected from his daughter, but saw no future in their relationship since he believed knowing him would harm her:

> He does not want to be a bad influence on his daughter who is apparently 8 ½ years old and does not know he is on death row. He appears frustrated that she did not know the truth about him and his status. He affirmed that it was now too late, because he had changed. He reported that he had made her a wall hanging and written her poems. He expressed concern that if they were to have contact now, it would only hurt her. He also worried that he would be a bad influence. (11.071 CR46).

While family and other social ties can bolster the will to live, these ties could be operating in reverse for death row prisoners who maintain family ties only with great difficulty. Their continued life perpetuates the stigma of their offense and their sentence, whether through media coverage of their case or even the simple act of sending and receiving mail from not only a penal institution, but from death row. One informant stressed death row's higher profile compared to the rest of the prison. He observed: "Everything that happens on death row is highlighted [to the outside world]. Where regular population, you may never hear about it" (Inf. 93:5). Just as the DHD literature

regarding those with terminal illness suggests, family ties can have a dual and paradoxical effect in both sustaining and diminishing the desire to live.

SUMMARY AND DISCUSSION

My data suggest that EHs may not be that different from non-EHs in their vulnerability to desires to hasten death, at least as measured by their experiences with depression and other mental illness, suicidality, or negative childhood experiences. As Cunningham and Vigen (2002) report, most death row prisoners shoulder these burdens. More sensitive analyses may be able to refine a better understanding of this relationship if one exists.

On the other hand, other indicators are consistent with the suicide literature. For example, most EHs acted on the desire to hasten death before age 35, and among those who were not IPV-EH and had no history of prior incarceration, they acted on average in their late 20s. This is consistent with the finding that most prison suicides are committed by those less than 35 years old.

In addition, as with other prisoners who suicide, EHs are more likely to have prior criminal convictions, prior convictions for crimes against persons, and prior experiences with incarceration than non-execution-hasteners. The exception to this was among those sentenced to death for offenses involving a domestic crisis. This group's criminal experience was lower than the other EHs, whether measured by their prior convictions, crimes against persons, or time in prison. This again is consistent with the suicide literature, which suggests that their desires to hasten death have a different pathway.

The effort to deconstruct differences in capital crimes yielded some interesting results. Compared to other similarly situated death row prisoners, the execution-

hasteners were more likely to have used a gun in the murder, and less likely to have committed the crime with another person. A relationship regarding solo offending and desires to hasten death is consistent with prior research finding intensified social responsibility for acts undertaken individually. These prisoners may feel that they are more culpable for their crime than those who are able to diffuse responsibility onto another. As a result, they may feel that they deserve their punishment, and so ask for execution. Another darker dynamic may be at work, however. These offenders may translate this sense of increased culpability into a statement about their disposition or character. They may decide they are worthless and lacking the possibility of redemption in this life. This feeling could combine with other stressors or vulnerabilities to motivate a decision to hasten death. This more psychological dynamic deserves further exploration.

The finding about gun use is also provocative because it suggests processes of responsibility that are different from those predicted, namely that hastening execution would be connected to crimes that involved greater interpersonal violence. Instead, this finding suggests the possibility that the prevalence of gun deaths reflects more impulsive or intoxicated acts. Steven Morin told a friend said that he did not intend to kill his victim – he had been in the middle of stealing her car when she confronted him – but "something came over him and the gun went off" (murderpedia.org n.d.). Richard Foster described his gun homicide as an "accident" and "not intentional" (txexecutions.org; March 14, 2000 Order, 3). This could contribute to greater regret and remorse.

I also hypothesized that prisoners may have experiences that increase their motivation to hasten death. While the literature on isolation confinement suggests a connection to elevated suicide risk, my data do not draw a strong connection between

conditions of confinement and hastening execution. This is consistent with Blume's (2005) finding. While the percent hastening execution increased slightly at the Polunsky unit, this finding is confounded by other factors, such as changes in the law and increases in executions overall. Interview data explain how prison culture could act as a brake on hastening execution by stigmatizing desires to hasten death. At the same time, it suggests how isolation confinement could increase the possibility of hastening execution through dynamics other than increased suicidality. Because prisoners have less interaction with each other, taking actions that mark the EH as "weak" carry less risk. It may also inhibit a contagion effect because people have less contact with each other, and therefore less opportunity to talk about waiving appeals.

Another important finding in this study is the very early point at which most EHs articulate and often act upon their desire to hasten execution. This recasts the role of prison conditions. Conditions may not play as prominent a role in initiating desires to hasten execution, though they may harden prisoners' desire to stay the course in waiving appeals. Certainly the EHs' early desire to hasten execution is consistent with the prison research finding that the risk of suicide is particularly elevated early in the prison term.

I explored the possibility of other temporal patterns associated with events. I found that almost two out of five sought to waive appeals within four weeks of the anniversary of the homicide. Two thirds opted to waive within eight weeks of the anniversary. Almost two out of five sought to waive appeals within four weeks of a court action. Over half opted to waive within eight weeks of a court action.

This may reflect that litigation is one of the pains of death row imprisonment. Its ups and downs of court decisions is difficult to bear (Harrington 2000), and death row offers few distractions from the waiting. In addition, the increased media attention

occasioned by court decisions may also spur the prisoner to action, as may be his sense that he can improve his chances of hastening execution if he acts in between court actions, and not, e.g., while a petition is pending.

The organization of legal appeals appears to shape efforts to hasten execution. EHs tend to express and act upon their desire for execution early in the criminal justice process. Almost 50% expressed the desire at trial, and over 51% acted on it during state *habeas* proceedings. When the law permits to waive early, they generally do. Since legal changes permitting them to waive an adversarial first appeal, almost 75% live on death row fewer than four years. This is a reversal of the percentage of EHs living on death row for more than four years prior to this court decision.

This has both social psychological and legal implications. We saw that in MS2, almost a quarter made formal efforts to end their appeals at some point. While the evidence of wavering among EHs is not clear, many condemned prisoners plainly struggle with this decision – and decide to continue living. Dismantling structural obstacles to desires to hasten death may increase the possibility that some who experience transitory desires to hasten death – which is characteristic of desires to hasten death among those with terminal illness – will have more opportunities to change their mind. Given how early these prisoners took steps to waive their appeals – Joe Gonzales was on death row only 252 days – giving them time to acclimate to death row before they make final decisions to hasten execution may decrease execution-hastening.

Of course, this raises the question whether there is anything wrong with facilitating executions of the apparently willing. I suggest that there is. Setting aside moral concerns about the death penalty, it is troubling that the current state of the law permits the execution of an individual without any meaningful (i.e., adversarial) appellate

review. This concern is particularly weighty when evidence presented during the putatively adversarial proceeding – the trial – is limited by someone actively seeking the death penalty for himself. This calls into question whether the death penalty is in fact being meted out to the "worst of the worst."

Finally, my findings regarding protective agents suggest that non-EHs have more social support. However, I qualify this finding with the observation that these measures – of execution witnesses and burial in the prison cemetery – are imperfect. They may reflect a prisoner's desire not to put his loved ones through the sadness of witnessing his execution, and the family's inability to pay for a private burial. More research should be conducted to understand the contribution of social support.

Chapter 5

Why Die

In this section, I examine how EHs and others interpreted their deaths. Based on interviews conducted in connection with this dissertation, contemporaneous media reports that often featured interviews with the EHs and those close to them, final statements before execution, and court records, I identified categories of meaning. These meanings may tell us something about the larger normative world EHs inhabit. As Douglas observed, we draw "from various spheres of experience for the purposes of *constructing meanings* for these suicidal phenomena (1967:247) (emphasis in original).

I describe these data not because I believe they should be accepted uncritically. In the following chapter, I deconstruct the production of these explanations in court processes (see Muschert et al. 2009 for media analysis). I am also not arguing a causal relationship, e.g., that people are hastening death because of their religious beliefs. Instead, I am suggesting people use cultural touchstones to make sense of their experience.

The frames are also not exclusive. As one informant emphasized, persistent EHs have a "constellation" of reasons for giving up their appeals, whether because they want to take control, do not see the point of prolonging the proceedings, feel hopeless that litigation could make any difference in their lives, cannot stand the conditions, or feel that accepting execution gets them right with God. In fact, this is what could make them so difficult to dissuade (Inf. 13 pt. 1:20"08). Nor are they always distinct frames.

Expressions about the futility of appeals can include both ideas of indisputable guilt and complaints about the criminal justice system. The table therefore simply reflects common frames as a rough typology. It includes explanations described by informants that appeared to me to be secondary or speculative:

Decision Frame	Media, court documents, final statements, interviews	Including secondary & speculative reasons
Accountability/remorse/ accept verdict & sentence	61.3% (19)	64.5% (20)
Religious beliefs	58.1% (18)	64.5% (20)
Fact of incarceration/ pointlessness of life in prison	51.6% (16)	58.1% (18)
"Get it over with"/ futility of appeals	45.2% (14)	--
Complaint about criminal justice system	22.6% (7)	--
Autonomy/choosing time of death	19.4% (6)	22.6% (7)
Prison conditions	16.1% (5)	29.0% (9)
Other[29]	32.2% (10)	--

Table 16: Reasons for hastening execution.

[29] These included desires to bring closure to survivors; spare their families pain; save taxpayer money; and fears of being too old when they got out, if they got out, to reintegrate into society.

MEANING OF HASTENING EXECUTION AND EXECUTION

Accountability/remorse/acceptance of the verdict and sentence

Over half of the EHs characterized their execution as a fair way to take responsibility. Included in this category were any statements expressing remorse, being sorry, paying a debt, or accepting responsibility. James Porter described himself as "the type of individual to face up to my responsibility and my mistakes" (Graczyk 2005). Similarly, Michael Rodriguez told a reporter:

> I have a lot of people here telling me how unfair the system is. At some point in our lives, you have to have some sort of accountability. I can't see how people in my situation deny that (http://off2dr.com/modules/extcal/event.php?event=191).

He wanted the victim's family "to know how truly sorry I am, and I am willing to pay…. I think it's a fair sentence. I need to pay back. I can't pay back monetarily. This is the way" (http://off2dr.com/modules/extcal/event.php?event=191).

These statements often coincided with religious beliefs. Eliseo Moreno, for example, said in his final statement, "I'd like to say I'm here because I'm guilty. I have no grudges or anything against nobody. The word of God tells me the wages of sin are death. I'm willing to pay according to the laws of Texas because I know I'm guilty" (Associated Press 1987b).

Steven Renfro's prosecutor and former classmate spoke with Renfro after the trial. He described Renfro's decision: "By voluntarily going ahead and being punished, it's like atonement" (Graczyk 1998). In his final statement, Renfro said, "I would like to tell the victims' families that I am sorry, very sorry. I am so sorry. Forgive me if you can. I know it's impossible, but try. Take my hand, Lord Jesus, I'm coming home" (Texas Department of Criminal Justice Executed Offenders, Renfro Last Statement).

Charles Tuttle, who at the time of the death death verdict invoked biblical language, saying "That's what I want, that's what I got. An eye for an eye" (Graczyk 1999b), addressed witnesses in his final statement:

> To Kathy's family and friends that were unable to attend today, I am truly sorry. I hope my dropping my appeal has in some way begun your healing process. This is all I am going to do to help you out in any way for the nightmare and pain that I have caused you, but I am truly sorry and I wish I could take back what I did, but I can't. I hope this heals you. To my family: I love you. When the tears flow, let the smiles grow. Everything is all right. To my family: I love you (Texas Department of Criminal Justice Executed Offenders, Tuttle Final Statement).

Larry Hayes, who killed his wife and a convenience store clerk, told a reporter he was "torment[ed]… every day for what I've done" (http://www.txexecutions.org/reports/310.asp). In his final statement, he addressed the execution witnesses:

> I would like for Rosalyn's family and loved ones and my wife, Mary's, family to know that I am genuinely sorry for what I did. I would like you to reach down in your hearts and forgive me. There is no excuse for what I did. Rosalyn's mother asked me at the trial, "Why?" and I do not have a good reason for it. Please forgive me. As for my friends and family here - thanks for sticking with me and know that I love you and will take part of you with me. I would like to thank one of the arresting officers that I would have killed if I could have. He gave me CPR, saved my life, and gave me a chance to get my life right. I know I will see Mary and Rosalyn tonight. I love you all (Texas Department of Criminal Justice Executed Offenders, Hayes Final Statement).

Benjamin Stone told the press that hastening execution was "it's the only way I'll find peace of mind" (Graczyk 1997). One interviewee described Stone's experience succinctly: "It was just something he really couldn't live with. And he was pretty intent about getting killed… It wasn't because…he was afraid of going to prison. Or he thought life in prison would be too harsh for him. I don't think that really entered into it (Inf. 73:2, 5).

Richard Beavers told the court that, "I have a debt to pay and I'm ready to pay it" (March 2, 1994 hearing at 13). Interestingly, while a competency report indicated that Beavers was not remorseful, saying "I guess I felt sort of bad for the families but I wouldn't call it remorse" (Aug. 11, 1993 report, 1) – those who knew him recalled him differently. Recalling he "truly was sorry" and "remorseful," he "wanted to be punished" because he "felt like he should die for doing the crime that he did." He was "someone who was living with a lot of anguish," "motivated by self-loathing," and "wanted to die" (Inf. 10:1-6).

Beavers is not the only one who may have modulated his description of his state of mind according to the audience. Other prisoners also appear to have understated their remorse in court-related proceedings. Jeffrey Barney, for example, made very limited statements in court about his motivations. He took responsibility, "Well, I am guilty of what I was charged with. I just wish that the sentence would be carried out," and he explained, "I don't feel like sitting the rest of my life in the Texas Department of Corrections" (March 11, 1986 hearing at 17). To a jail chaplain, he would say "he is guilty and has made it right with the Lord and has to pay his debt with society" (Associated Press 1986). In his final statement, by contrast, he expressed his remorse more clearly: "I'm sorry for what I've done. I deserve this." Then he either said, "Jesus forgive me," (Crawford 2006) or "I hope Jesus forgives me" (Associated Press 1986).

Religious beliefs

I coded liberally for "religious beliefs," more interested in whether prisoners claimed a sacralizing frame than whether they were attributing their decision to religion. Therefore, if a prisoner announced "I believe in Jesus Christ," I included him in this

category, even though the idea was followed by another subject. Leo Jenkins, for example, said in his final statement, "I would like to say that I believe that Jesus Christ is my Lord and Saviour. I am sorry for the Kelly['s] loss, but my death won't bring them back. I believe that the state of Texas is making a mistake tonight. Tell my family I love them" [30] (Crawford 2006)). Similarly, while religion does not seem to have been a strong motivator for Charles Rumbaugh, his final statement borrowed from religious language ("although you don't forgive me for my transgressions, I forgive yours against me" (Crawford 2006)). I included him in this category as well.

Several execution-hasteners cited religious beliefs more directly. In addition to Moreno, above, Anthony Cook said in his final statement, "I just want to tell my family I love them, and I thank the Lord Jesus for giving me another chance and for saving me" (Texas Department of Criminal Justice Executed Offenders, Cook Final Statement). Richard Foster, a longtime death row prisoner who led Christian study groups, said:

> I have been crucified with Christ. It is no longer I who lives, but Christ who lives in me. So for the life for which I live now in the flesh, I live by faith in the Son of God who loved me and gave himself for me. I love you, Annie. You have been the best friend I have ever had in the world. I'll see you when I get there, okay? I am ready warden (Texas Department of Criminal Justice Executed Offenders, Foster Final Statement).

Larry Hayes appreciated his time of death row because it gave him the opportunity to "make peace with God" and prepare to die (Kimberly 2003).

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[30] This statement may reflect that his unhappiness that his execution had become a major media event (complete with an HBO documentary). Jenkins' execution was the first one victim survivors were permitted to view. In fact, the survivors in his case led the political battle to obtain the right to attend his execution. While press reports suggested Jenkins supported the victims' survivors viewing his execution, one informant contradicted this (Inf. 37:10).

Michael Rodriguez in his final statement linked religion to his apology to the survivors:

> I know this no way makes up for all the pain and suffering I gave you. I am so so sorry. My punishment is nothing compared to the pain and sorrow I have caused. I hope that someday you can find peace. I am not strong enough to ask for forgiveness because I don't if I am worthy. I realize what I've done to you and the pain I've given. Please Lord forgive me. I have done some horrible things. I ask the Lord to please forgive me. I have gained nothing, but just brought sorrow and pain to these wonderful people. I am sorry. So so sorry. To the Sanchez family who showed me love. To the Hawkings' family, I am sorry. I know I have affected them for so long. Please forgive me. Irene, I want to thank you and thank your husband Jack. I'll be waiting for you. I am so sorry. To these families I ask forgiveness. Father God I ask you too for forgiveness. I ask you for forgiveness, Lord. I am ready to go Lord. Thank you. I am ready to go. My Jesus my Savior there is none like you. All of my days I want to praise, let every breath. Shout to the Lord let us sing (Texas Department of Criminal Justice Executed Offenders, Rodriguez Final Statement).

Another believed it important to get to heaven as soon as possible in order to apologize to his victims. "He wanted to die so he could go to Heaven" (Inf. 84:3). "God had told him to waive the appeal so that he could be with the victims quicker. And to then apologize to them quicker. He indicated to him that that was very important to him, that he apologize to them for what he had done" (Inf. 84:2)

Some prisoners, however, expressed thanks to God without linking it to their culpability for the offense. Stephen Morin, whose story of being spiritually reborn is available on DVD sold by Focus on the Family in conjunction with Christianbook.com, said in his final statement:

> Heavenly Father, I give thanks for this time, for the time that we have been together, the fellowship in your world, the Christian family presented to me (He called the names of the personal witnesses.). Allow your holy spirit to flow as I know your love as been showered upon me. Forgive them for they know not what

> they do, as I know that you have forgiven me, as I have forgiven them. Lord Jesus, I commit my soul to you, I praise you, and I thank you (Texas Department of Criminal Justice Executed Offenders, Morin Final Statement).

Robert Anderson invited execution witnesses to join in his religious beliefs.

> To Audrey's grandmother, I am sorry for the pain I have caused you for the last 15 years and your family. I have regretted this for a long time. I am sorry. I only ask that you remember the Lord because He remembers us and He forgives us if we ask Him. I am sorry. And to my family, and my loved ones - I am sorry for the pain for all those years and for putting you through all the things we had to go through. I ask the Lord to bless you all. Tammy, Irene, Betty, Dan, Judy – I love you all. And Jack, thank you. Warden (Texas Department of Criminal Justice Executed Offenders, Anderson Final Statement).

While Informant 13 believed that the pains of imprisonment on death row and the prisoners' assessment of their legal cases were the primary motivators, he recognized that religion framing seemed to offer comfort to some: "I've gotten myself into this. Is there any hope left for me anywhere?" (Inf. 13 pt. 1:12"40, 12"47). Informant 25 thought those who find religion on death row are "the lucky ones;" they are the "only ones that aren't scared" (Inf. 25: 2"44). They also offered an escape from one's prior sins; their "slate was clean" (Inf. 25:44"46).

Informant 13 also suspected that some death row spiritual advisors may have encouraged death row prisoners to hasten execution by framing it in positive spiritual terms. The chaplains may have communicated that asking for forgiveness also meant accepting the consequences of one's actions. Accepting execution was a way to get right with God (Inf. 13 pt. 1:12"47). Susan Blaustein's article about Anthony Cook's execution suggests the complexity of the role of death row spiritual advisors:

> Jack Wilcox had nothing but enthusiasm for the force of Cook's conversion. "We walk into the death house, and he [Cook] says to me, 'Hey, Jack, I'm excited!' Two hours before he's going to die, and he's excited? I say, 'Fantastic! That's great!' . . . This man saw prison five times, he committed a horrible kidnapping and murder … a sure loser!" exclaimed Jack, who himself had found the Lord

> after a life on the streets. "And then three year later, you be lookin' at a person prayin' to God."
>
> "We would have like to have seen him continue with his appeals, because he was a great witness,' [Jack's wife and fellow volunteer chaplain] Irene interrupted, "but he believed in the death penalty."
>
> Jack jumped back in, impatient. "It's not for us to say. A lot of men [on the row] are upset because he gave up his appeals. I say, 'Look, the man's been prayin' to God for two years – you don't get because a man and his prayers.' We wanna let God drive the car," he explained (Blaustein 1994:59).

The spiritual advisors could offer "enthusiasm" for a decision to die and share a profound personal connection through a jointly undertaken spiritual connection. Irene Wilcox may have been uncomfortable with her husband's support for Cook's decision, but even she saw Cook through his role as an agent for Christianity. Hastening execution by dropping appeals could become a way to demonstrate the power of one's faith.

Incarceration, autonomy, and the futility of appeals

Comments about prison were coded as specifically about conditions (as opposed to the fact of incarceration) where a particular feature of incarceration was identified other than life in a cell. Alexander Martinez was described "hat[ing] interacting with the folks on death row…. [T]he prospect of forty more years around the people that he spent time with in prison was intolerable to him" (Inf. 40:3-4). By contrast, Swift described his life on death row as a "battle;" without more, I coded his complaint about conditions of incarceration as speculative.

The pains of imprisonment were plainly an important part of many of the EHs' explanations for their decision to waive appeals. Significantly, however, more EHs who

complained about incarceration were unhappy about the **fact** of incarceration rather than the **conditions** of incarceration.

Some prisoners specifically complained about death row conditions. Larry Hayes cited the grim conditions on death row and told a reporter that if people had really wanted to punish him, they would have sentenced him to life in prison: "Executing me is sending me to heaven" (Kimberly 2003). Danielle Simpson complained about leaky roofs that flooded cells, broken showers, toilets that would not flush, and unresponsive officers (June 9, 2009 hearing, 30-31; McGreal 2009).

More often, however, prisoners spoke of the pointlessness of prison. As Barney put it, "I don't feel like sitting the rest of my life in the Texas Department of Corrections" (March 11, 1986 hearing at 17). Some thought appeals were futile, which, combined with their sense that incarceration was pointless, led them to abandon appeals.

> He was just, fuck it, they're going to kill me, let's get it over with. It doesn't make any difference what you do. They're going to kill me. And you know what, I want to die. There was no desire to being reunited with his lord or anything like that. It was just fuck it. Even if they give me life, I don't want to live in that box. That's no life. Might as well just kill me (Inf. 23:4).

Where some sounded angry, others seemed resigned. One prisoner felt that if his appeals would lead to his release, he would be interested in pursuing them. "But if it's just one of these, give me a new sentencing hearing and I have to stay in jail for the next however many years, forget it" (Inf. 16:4). Another speculated:

> But him looking around and seeing … other people that have been on death row for thirty some odd years, he just said fuck it. I'll let them kill my ass rather than just sit around being miserable with not much of any expectation for release. That was the read I got (Inf. 2:3).

Another feared the effects of long-term incarceration on death row.

> "I ain't never in my life seen anybody more ready to die," said Carl Kinnamon, another death row inmate from Harris County, whose cell was next to [EH Jerome] Butler's. "It's on account of his age he don't want to continue his appeals. He doesn't want to be among the walking dead" (Fair 1990).

Butler also echoed another relatively common complaint (N=5): even if he won a life sentence, he would be too old have restart a life when released. "I'm 57 now, and I'd be in my 70s when I got out. What am I supposed to do? Go live under a bridge?" (Fair 1990). James Porter wrote the TCCA:

> To be honest I would wrather [sic] be executed than spend my life in prison with no chance of ever getting out. (IF) I had the chance of getting out one day while still young enough to enjoy life, getting the right help to become a productive member of society, (but) I don't see and want [won't?] see this [sic] happen in the state of Texas prison system (March 2, 2003 Porter "Motion for Apology to CCA" at 2).

While many ascribe to EHs a desire to exercise some control in an environment in which they have little, the EHs in this study made relatively little reference (N=7) to this kind of autonomy. Esequel Banda was one of these exceptions: "Everyone knows that you leave Ellis in a body bag, one way or the other. This way, I get to choose. Besides, who knows what's out there? It might be better. Can't be no worse" (Johnston 1998a) David Martinez told a prison counselor that "he could never take his own life but would maybe like to decide the time so by giving up his appeals he would get some say so" (Respondent's Exh. 11 at 25). While a more ambiguous explanation of his decision to waive, Alexander Martinez's comment highlights the constraint he felt in prison: "I don't want to be what I have come to be in this life. I don't want to simply exist in this life. I

want to live a life where I have free will and choices to make for myself" (http://www.clarkprosecutor.org/html/death/US/martinez972.htm).

While not directly expressing the idea of controlling their destiny, some adverted to it by expressing their desire to stop playing the "games" of litigation. James Smith told the judge he wanted an execution date because "I refuse to sit up there on that fucking death row twelve fucking years while you guys play fucking games" (July 1, 1985, hearing at 15). Stephen Morin also said did not want to be "a pawn to be bandied back and forth in the TX court system for years to come" (Associated Press 1982).

These assertions of autonomy sometimes appeared to be an interpretive gloss imposed by the informant. Informant 13 stressed:

> [T]he utter lack of control that they have and it is human nature to want …to have some sense of "I can do this" and that when it seems like even in your own appeals your lawyers are deciding things for you… When you feel that folks who say they want to help you really have their own total set of agendas, not yours, in order to protect your notion that you're a human being, sometimes you'll adopt extreme measures to do that. To cry out to say, you know, I count I matter, I can make this decision, even if it's a decision to die, I want to try to die at least to some degree on my own terms. Just respect me for that and stop trying to tell me that I'm nuts" (Inf. 13, pt. 2:0"7).

Another informant believed that the EH's:

> [D]ecision to drop his appeals and die did not appear to me to be a choice between living here for some period of years and dying. It appeared to be a more poorly thought out way to poke the State in the eye over the fact that he didn't have a chance at getting a reversal and getting a fair trial (Inf. 8:9).[31]

[31] Informant 13 the utter lack of control that they they have and it is human nature to want …to have some sense of "I can do this" and that when it seems like even in your own appeals your lawyers are deciding things for you… When you feel that folks who say they want to help you really have their own total set of agendas, not yours, in order to protect your notion that you're a human being, sometimes you'll adopt extreme measures to do that. To cry out to say, you know, I count I matter, I can make this decision, even

While believing some of this EH's motivation consisted of a desire to control his destiny, in this informant's opinion, he was not motivated, by a feeling of, "oh my god, I would rather die than live here" (id.). Instead he felt the EH was asserting himself to punish the State, even though it meant cutting off his nose to spite his face.

Another informant also described an EH's decision as a combination of desires for autonomy, dignity, and to express hostility toward the system:

> In his case, it was a conscious "screw you" to everybody else, combined with a decision that he was not going to live like they wanted. And this was part of it. Like they wanted him to live, like an animal. And I don't mean to ennoble this in an odd way. But in the sense that it was the thing within his control to decide. … This was something that he wanted for the statement. Not control over his environment but control over what was going to happen. And I don't think he needed that, I think he just chose it. … He said this was a fuck you. Bring it. And said, I'll accept this, fine, I'll do this. You're not going to get a cry out of me, you're not going to get a whimper, you're not going to get a beg (Inf. 40:9-10).

Complaints about criminal justice system

Danielle Simpson, for example, complained that judges just "just do what they want to do":

> And then the way the appeals process is, to me, in my own opinion, there is really no such thing as the law because the way I see it, they're going to do what they want to do regardless, I mean, whether it's a judge or prosecutor or whoever. There is no such thing as the law. When them cases go through there, they really don't even take the time to look at those cases and review them thoroughly. They just do what they want to do. They decide who's going to get action and who's not. That's not justice. That's not justice.
>
> And, I mean, I refuse to just live like that any longer. I'm ready to get this over with as soon as possible. I'm well aware of the situation and the process of the execution. I've already done, you know, prepared myself for it; and, therefore, I'm ready. I'm ready to get it over with as soon as possible. That's all I'm asking. (June

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if it's a decisions to die, I want to try to die at least to some degree on my own terms. At least respect me for that.

9, 2009 hearing, 31-32).

Rumbaugh accused the State of hypocrisy in executing him:

> Just as I realize and acknowledge that I can proffer no excuse for my actions in causing the death of a human being, so must I state my clear and emphatic belief that neither can society proffer any righteously acceptable or defensible excuse for the imposition of the death penalty. My crime was an individual one committed by me alone and the responsibility is therefore mine alone, whereas society's crimes are concerted ones committed in the name of and by the authority of each and every citizen and therefore the responsibility is that of each and every citizen. Murder is Murder! Just as society condemns me, so must it condemn itself. Just as society labels me a 'murderer' for causing the death of a human being, so must it label itself for knowingly, intentionally, premeditatedly and hypocritically causing the deaths of each an[d] every human being throughout this country whom it has put to death. And the only possible 'right' that society can claim i[s] the RIGHT of MIGHT! (Crawford 2006 Appendix 1).

Ramon Hernandez lodged one of the more peculiar complaints. As the *Houston Chronicle* recounts, Hernandez refused to ask for a stay of execution because he believed that he could not represent himself because the court had appointed counsel to assist him. This was not correct. The state court had removed counsel from the case at the execution date setting hearing, but Hernandez apparently believed that they had not been properly removed by the court. Hernandez reportedly "believe[d] that he would waive claims to grounds for appeal if he now authorizes a lawyer to take his case. As a result, he [was] resigned to die to show the inequities of the court system" (Klimko 1987). Hernandez told a reporter,

> Nobody wants to die…. But sometimes people have to make a stand. I have a paramount right to represent myself. If I get a stay, I won't be making a stand. Seeing that I'm a human being, it's very important for me not to die. But at the same time, it's important for me to make a stand (Associated Press 1987a).

Hernandez did not file any appeal on his own, and he complained that he was not able to represent himself because he was not given a complete copy of the trial transcript. The prosecutor ascribed Hernandez's complaint to "his warped sense of the law and the judicial process" (Klimko 1987). A veteran defense attorney agreed: "The guy has a whole misconception of the law….His point ain't going to help him. He can take his point to heaven with him" (Associated Press 1987a).

Hernandez's complaints about his legal representation resemble in some ways his furious preoccupation during his trial with his attorneys and the appointment process, among other things, as reflected in many of his *pro se* motions (CR 48-52; CR 276-81, CR 312-323). This was also not the first time he made apparently contradictory choices. For example, he vigorously litigated his case during trial and in its immediate aftermath, filing over 75 *pro se* motions, and complained that his lawyers were ineffective, withholding information from him, and conspiring with the court: "[B]ecause this attorney's did not prepare for this case the Petitioner shall die" (CR 352, CR 383). At trial, however, Hernandez testified and asked for the death penalty.

While it is not clear, Hernandez may have been principally concerned that his lawyers failed him in defending him during the guilt/innocence portion of the case. It is nonetheless troubling no mental health examination of Hernandez was ever conducted. He opposed in court his lawyer's pretrial motion for a psychiatric examination (RR 1:22). He subsequently refused to cooperate with mental health evaluators his lawyers sent to evaluation. (Hernandez complained that he did not consent to this examination and he

had the right to be examined by the expert of his choice) (CR 180-81). A court order denied the effort of one of the trial attorney to intervene as a "next friend" because there was "nothing in the record which cases any doubt upon the mental competence of Hernandez" (Lovelace v. Lynaugh 1987).

SUMMARY AND DISCUSSION

Expressions of remorse and acceptance of punishment feature prominently in EHs' explanations of what they are doing. This supports that aspect of the theoretical model that hypothesizes that criminological characteristics may increase their sense of culpability. Further, "individuals in the Western world *can* make use of suicidal actions to transform the meanings of themselves, of what they fundamentally *are*" (id., 286) (emphasis in original). By linking accountability to execution, many EHs not only draw on prevailing attitudes about the moral legitimacy of death as punishment for murder, but they also try to reclaim something positive from their profoundly spoiled and stigmatized identity. Like Douglas' "atonement suicides," these prisoners seek to transform not only themselves to themselves, but also their meaning in the eyes of others. "[T]he killing… of oneself can be used as a g*eneral indication of how serious, sincere, committed one is*" (Douglas 1967:301) (emphasis in original).

In addition, as Douglas points out, Western traditions see death as "a permanent transformation of the substantial self from the realm of the time-bound, space-bound, worldly, everyday meanings to the realm of the timeless, infinite, other-worldly meanings" (1967:285). Statements of religious beliefs intertwined with statements of remorse and responsibility to create a hopeful sequence of accountability, soul transformation, and entry into a better place.

Religion played a few different roles, however. Having a religious frame at execution did not necessarily mean that the prisoner felt positively about his execution. It could, as with Jenkins and Rumbaugh, be offered to demonstrate some commonality to preface their criticism of some aspect of their executions. Further, while complaints about the criminal justice system as a whole were not often articulated, they were clearly sufficiently present to undercut ideas of EHs as all satisfied with their execution. A number complained about the appellate process and about the death penalty.

In addition, in an interesting choice of words, one informant described death row spiritual advisors as telling prisoners that giving up appeals was a way to "man up" by accepting consequences. If this happened, this framing plainly drew on masculinity norms in an environment where perceptions of masculinity are essential for self-respect and survival. This translation of abandoning appeals could help offset the perceptions of weakness Informant 93 reported are associated with hastening execution.

Conversely, stepping down from a decision to waive appeals may also require face-saving strategies. In a poignant moment, one EH expressed fear as he was about to be executed. He told his lawyer:

> 'Man, it's nothing like I thought it would be,' he said. He was fidgeting and scared, and finally had his feelings of imminent death. He repeated this thought again. I asked him if he wanted me to file the stay. He hesitated, but said no. I knew that he was concerned he would be perceived as weak if he 'back out' now. I told him this decision did not belong to the guards or other inmates back in Ellis, none of whom knew what this was like. Both of us were familiar with the macho mythology of the Ellis Unit that decides who died like a man and who didn't. He seemed comforted, but said to file nothing. I stayed as long as I could, but I knew he had come too far for his ego to let him change his mind.
>
> The guards finally said I'd have to go. I asked one last time, got one more 'no' and left. Going out, the guard said contemptuously, 'looks like this one can't make up his mind' (Johnston 1998b).

Imperatives of masculinity may also account for the general preference for complaining about the fact of incarceration rather than the specific conditions. This may reflect that EHs generally decide to abandon their appeals before they arrive at death row, before they know what the conditions will be. In addition, however, this framing draws on ideas of "don't fence me in" and "death before dishonor" that resonate more heroically than complaints about corrupt guards and dirty food trays. After reciting a litany of complaints about the prison, Danielle Simpson interjected to a reporter, "I refuse to let the system or the officials see me in any kind of suffering or emotion. I refuse to let them see me like that, knowing they brought on some of that" (McGreal 2009). He might as well have been paraphrasing Sykes: "the man who can 'take it,' who can endure the regime of the custodians without flinching, is the man who wins the admiration and respect of his fellow captives" (1958:100-01).[32]

Masculine norms of independence and strength in an environment where complaining about conditions may help combat perceptions among other prisoners that the complainer is too weak to survive prison. In addition, it may help the prisoner reclaim a sense of dignity within his subordinated status. The relative absence of "autonomy talk" may be because the loss of autonomy is subsumed by the meaning of incarceration. At the same time, complaints about a lack of autonomy may make too explicit their subjugated status. This could account for why autonomy concerns seem to be more often voiced by people other than the prisoners.

[32] Simpson, along with most of the other prisoners who complained explicitly about the conditions, lived at the Polunsky unit. The isolation confinement conditions have attracted criticism from the outside world. This may have destigmatized to some extent complaints about conditions and transformed the complaints – and their request for execution – into a form of protest.

Many of those who expressed the futility of appeals suggest a pessimism that resonates with Blume's (2005:963) report that 39% of his respondents cited hopelessness as a factor in the EH's decision to abandon appeals. Hopelessness is a feeling closely associated with suicide (Nock et al. 2008). While some seem resigned or depressed, others appear to have expressed their hopeless anger through self-destruction. What gives force to this hopelessness is the sense that time in prison is pointless. This also reflects a pain of imprisonment. It highlights the difficulty some have finding ways to create meaningful lives, whether through self-improvement, social connection, or by making amends, while in prison.

Inferring too much from this small population is obviously inappropriate, but some differences in patterns of explanations may warrant further investigation.

Explanation of Decision	White	Latino	African-American
Accountability/remorse/accept verdict	65% (13)	57.1% (4)	25% (1)
Religious beliefs	65% (13)	28.6% (2)	25% (1)
Fact of incarceration/ pointlessness of life in prison	40% (8)	57.1% (4)	75% (3)
"Get it over with"/futility of appeals	40% (8)	42.9 % (3)	25% (1)
Complaint about criminal justice system	20% (3)	28.6% (2)	50% (2)
Autonomy/choosing time of death	0	57.1% (4)	50% (2)
Prison conditions	15% (3)	28.6 (2)	50% (2)
Other	25% (5)	42.9% (3)	25% (1)

Table 17: Explanations of death by race/ethnicity.

White EHs in this population were more likely than African-American or Latino EHs to embed their explanations of death and death-seeking in statements of remorse and/or religiosity. Unlike whites seeking physician-assisted suicide because of a fear of losing autonomy (Oregon Public Health Division 2011; Washington State Department of Health 2010),[33] the white prisoners in this study did not define their decision in those terms. In addition, this difference – again, among a very small group – raises the possibility of different trajectories to hastening death. African-Americans can be more cynical about the criminal justice system (Sampson and Bartusch 1998; Hagan and Albonetti 1982). These attitudes may contribute to discounting their interest in pursuing appeals and living in prison. Many believe that whites experience incarceration differently because they find it harder to assert race privilege in prison. They may embrace their punishment both as a way to escape a dissonant racial experience and to reclaim a more positive identity as a "good" death row prisoner.

33 In Oregon, 90.9% explained their decision to pursue physician-assisted suicide as a result of "losing autonomy;" 88.3% attributed it to being "less able to engage in activities making life enjoyable;" 82.7% to "loss of dignity;" 53.7% to "losing control of bodily functions;" 36.1% to being a "burden on family, friends/caregivers;" 22.6% to "inadequate pain control or concern about it; and 2.5% to "financial implications of treatment" (Oregon Public Health Division 2011). Washington state reported that in 2010, of those who used PAS (and for whom it received After Death Reporting Forms), 90% were concerned about loss of autonomy; 87% about losing the ability to participate in activities that made life enjoyable, and 64% about loss of dignity (Washington State Department of Health 2010).

PART THREE

LEGAL STRUCTURING OF EXECUTION-HASTENING

Chapter 6

The Legal Process as Deviance Reduction[34]

While the preceding chapter described common frames for EHs' death, but it did not situate them. This chapter examines more closely how meaning can be constructed within a particular setting. Specifically, this chapter examines legal proceedings and how they can serve as a forum in which social deviance (seeking to hasten execution) is neutralized by stock penal narratives. Prisoners marshal explanations that resonate with broader cultural beliefs about the death penalty, prison, and the legal system. They thereby deflect other interpretations, such as "suicide by cop," that are socially deviant, if apparently legally acceptable under *Rumbaugh*.

Sociolegal studies of courtroom narrative have generally analyzed verbal exchanges (Donovan and Barnes-Brus 2011), the role of larger cultural scripts (Donovan and Barnes-Brus 2011; Fleury-Steiner 2002; Umphrey 1999), the impact of laws and legal rules (Fraiden 2010; Ewick and Silbey 1995), and the disposition of individual judges (Lens 2009). Less common are studies that include in their analysis dynamics of the legal process. Susan Bandes' (1999) examination of court narratives of police brutality, for example, explains how institutional resistance to claims of police brutality, legal standards for civil rights lawsuits, the larger common law litigation paradigm, and

[34] A version of this chapter is forthcoming in *Law & Society Review.*

unequal resources available to litigants transform evidence of systemic government misconduct into anecdotes.

This chapter similarly integrates a discussion of the broader legal process with the content of narratives of death-seeking. It contends that the proceedings draw on a repertoire of cultural beliefs affirming the death penalty system. At the same time, this evidence is shaped by legal rules and practices that constrain the presentation of deviant counter-narratives. While legal rules "regulate what is able to be narrated" (Umphrey 1999: 403), so does the evidence. Some courtroom stories are more compelling than others not simply because they, for example, incorporate hegemonic beliefs, but because they are supported or contradicted by evidence that permits an alternative story to be told. Exploring the context from which courtroom narratives emerge is essential to interpreting the law's stories. Using Texas as a case study, this article considers execution-seeking narratives within a particular set of legal ethical rules, problematic mental health practices, and a larger legal culture that devalues and underfunds adversarial litigation.

In presenting these data, I do not seek to arbitrate whether a particular prisoner was correctly deemed competent. Each subject has been executed and without the ability to gather a more comprehensive account of a prisoner's mental capacity, there is no way to discern the "right" answer in these cases. Further, I do not argue that efforts to hasten one's own execution are *per se* evidence of incompetence. Instead, I contend that American culture generally views efforts to hasten death and the death penalty as deviant, and that (at least) lawyers see legal appeals as important in death penalty cases. The

prisoners' accounts help neutralize the deviance of the prisoner's effort to die. They do so by drawing on broader cultural narratives about penality and criminality, and marginalizing possible evidence of distress and suicidality. Further, the legal structures – here competency determinations – can privilege some stigma-defusing narratives over others, while the absence of an adversarial process hides counter-narratives.

This chapter first reiterates the legal standards for hastening execution. Next, it describes the ways in which prisoners who seek the death penalty are deviant. Then, it offers some background from the sociological literature about how narratives can neutralize deviance. This prefatory discussion is followed by research findings regarding the kinds of stories death-seeking prisoners tell courts to hasten execution, as well as the legal structures from which these stories emerge and in which they are accepted. It concludes with a discussion.

LAW OF WAIVER

As outlined more extensively in Chapter 2, courts evaluate an EH's decision to abandon appeals according to four criteria: the prisoner must make a knowing, voluntary, and intelligent waiver of his rights to appeal and must be mentally competent (Godinez v. Moran 1993; Rees v. Peyton 1966; Brady v. United States 1970). In both *Rumbaugh v. Procunier* (1985) and *Godinez v. Moran* (1993), courts confronted defendants with notable histories of depression and suicidality. In affirming Moran's competence, the Supreme Court essentially announced a unitary standard for mental competence in legal proceedings (Blume 2005, Poythress et al. 2002). The standard for mental competency to

waive appeals and expedite execution is the same as the standard for mental competency to stand trial, and as *Moran* and *Rumbaugh* make clear, mental competence is not a high bar to cross. The Supreme Court in *Indiana v. Edwards* (2008:178) recognized that this standard permits even severely mentally ill defendants to be found competent. Many lawyers casually refer to competence as requiring only that their clients be "oriented times three," i.e., are aware of time, place, and person, screening out only the most psychotic defendants.

Court proceedings to determine competence combine a low legal standard with highly subjective evaluations that generally eschew empirically-based, standardized measures of competency assessment (Zapf et al. 2004; Bardwell and Arrigo 2002; Poythress et al. 2002). Maroney complains that "adjudicative competence, despite its enormous importance, is on the whole a surprisingly ramshackle affair [as] [i]t is poorly understood, under-theorized, and inconsistently implemented" (2006:1380). While this "ramshackle affair" may be unsatisfactory from the perspective of reliability and validity, its relatively unstructured quality makes it a rich source of sociolegal data.

Studies examining the context of legal decisions about mental status are scarce. In his study of legal proceedings on involuntary commitment for psychiatric hospitalization, James Holstein (1993) examined the "constitutive practices" of civil commitment courts. Holstein considered how clinical recommendations and legal decisions to commit individuals for involuntary psychiatric treatment were framed by ways in which, for example, the legal system was organized, how participants interacted

with each other, and the cultural scripts, such as those surrounding gender, age, and "home," informed the process.

EHs do not present themselves to court with the same regularity as candidates for involuntary psychiatric treatment. Therefore, they do not have the uniquely constituted environment Holstein observed. Instead, EHs thrust themselves into the workaday criminal court world of routine arraignments and guilty pleas, with most of the participants – judges and attorneys alike – taken aback at the prisoner's request and uncertain of the law. Because we cannot understand EHs as Holstein did, through a dedicated, specialized court, this study relied not on courtroom observations, but court documents, including hearings and expert competence evaluations.

HASTENING AS DEVIANT

For some imagining life on death row, nothing may seem more understandable and rational than an attempt to end the pains of imprisonment and seize control of the process by ending appeals. Nonetheless hastening execution by abandoning appeals is a socially deviant act. Most death row prisoners are committed to pursuing their appeals. EHs represent about 11% of those executed, not of those sentenced to death. EHs seek to expedite execution within a local death row culture where hastening is not the norm, and also within a larger culture that has historically criminalized and stigmatized desires to die. The Supreme Court in *Washington v. Glucksberg* (1997) considered a statute prohibiting doctors from acceding to the request by terminally ill patients for assistance in hastening death. It canvassed a wide range of social concerns associated with

hastening death of others, and noted that bans on assisting suicide are widespread and "longstanding expressions of the States' commitment to the protection and preservation of all human life" (710). Whether to help someone hasten death is a question fundamental to the moral fabric of the country: "Indeed, opposition to and condemnation of suicide – and, therefore, of assisting suicide – are consistent and enduring themes of our philosophical, legal, and cultural heritages" (710). It cited "a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults" (723).

The *Glucksberg* Court was troubled at the prospect of facilitating suicide: "all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. …The State has an interest in preventing suicide, and in studying, identifying, and treating its causes" (730). The Court was particularly concerned by the problem of accurately diagnosing and treating depression, and cited empirical data linking depression, mental disorders and desires to hasten death (730-31).

The response to *Glucksberg*'s invitation to the states to experiment with different physician-assisted suicide legal regimes also reflects the strength of the concerns expressed in that case. While the "right" to die under certain circumstances has gained some popular and political support within the past 20 years, physician assistance in dying is clearly legal in only two out of 50 American states, is highly regulated, and is a right

relatively rarely exercised[35] (Hillyard and Dombrink 2001; Oregon Death With Dignity Act 1997; Washington Death With Dignity Act 2008). Reflecting recurrent concerns regarding requests to hasten death, the two states that do permit physician-assisted suicide prohibit assistance to any terminally ill individual who suffers from "a psychiatric or psychological disorder or depression causing impaired judgment" (Oregon Death With Dignity Act 1997, O.R.S. 127.825 § 3.03; Washington Death With Dignity Act 2008, RCW 70.245.060).

Schmeiser has observed that in execution-hastening cases, "[t]he specter of suicide, and the potential for judicial complicity in a private act that takes on emphatically public dimensions here, in fact haunts courts as they reason through their decisions" (2011:89). One legal case (from Nevada, not Texas) illustrates tensions courts may feel in accepting the full implications of *Rumbaugh*. In that case, the court took pains to discredit an expert's finding of the prisoner's suicidal ideation, even as it noted that suicidality did not indicate incompetence (*Dennis ex rel. Butko v. Budge* 2004:892-93).

Further, death penalty appeals are generally understood (at least by lawyers) to play an important role in the American death penalty, which relies heavily on a system of legal procedures for its legitimacy (Garland 2010). "Death is different," and in capital cases, courts are instructed to insist on "super due process" (*Gardner v. Florida*

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35 In Oregon in 2010, 59 patients died as a result of ingesting lethal physician-prescribed medications; six patients died after ingesting medications prescribed prior to 2010 (Oregon Public Health Division 2011). In Washington in 2010, 51 patients were known to have died as a result of ingesting lethal physician-prescribed medications (Washington Department of Health 2011).

1977:357-358; *Ford v. Wainwright* 1986:405). Supreme Court opinions have cited the existence of legal appeals – namely appeals of trial error ("direct appeals"), as opposed to post-conviction collateral attacks such as petitions for writs of *habeas corpus* – in finding the death penalty constitutional in 1976 (Jurek v. Texas 1976:276; Whitmore v. Arkansas, Marshall, J., dissenting). Even in Texas, the value of appeals should not be wholly discounted. Since the return of the death penalty in 1977, only 44% of those sentenced to death in Texas have been executed, with almost 22% winning reversals or commutations (Snell 2010).

A few judges in this study expressed their concern with bypassing appeals. As one judge said:

> This is a very unusual situation, it is for me, for the system that we operate under. To me it is just – to me it is just not normal that you want to do what you want to do. It is almost like assisting you in a suicide, because you want to represent yourself on a case of this type" (*Gonzales* RR 2:40).[36]

Another judge refused to permit a prisoner to waive his appeals even though he had found him competent to do so:

> [I]t would be my statement on the record that before any man is executed out of this court, that my conduct, as well as counsel's conduct and the jury's conduct be thoroughly examined from every angle whatsoever, regardless of any request by a defendant to be put to death (Hayes, July 6, 2000 hearing at 20-21).

Permitting a prisoner to sidestep this process runs contrary to this foundational belief in the importance of appeals.

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[36] Gonzales had made clear that he sought to represent himself in order to get the death penalty and waive appeals.

Finally, embracing punishment is deviant. As Susan Schmeiser has argued, these prisoners challenge a core belief about the purpose of punishment: "Revenge… seems less sweet and justice less pure when punishment finds a willing recipient" (2011:73). By inviting the death penalty, these prisoners threaten to "convert what passes for just punishment – and the rational adjudication that undergirds it – into a damning theater of self-immolation" (2011:76).

As noted, under *Rumbaugh*, even apparent suicidality is no legal bar to expediting execution. The low legal standard for establishing competence therefore invites inquiry into purposes of the more elaborate explanations presented in many of these cases. I argue below that the EH narratives, in conjunction with the legal system, distance the prisoner's request from these concerns.

EXECUTION-HASTENER ACCOUNTS

Sociologists have long observed that people explain deviant behavior by "align[ing] their behavior with culturally acceptable language to restore order and interaction" (Orbuch 1997:463). Whether described as "vocabularies of motive" (Mills 1940), "narratives," or "accounts" (Orbuch 1997),[37] they are designed to "display[ ] the reasonableness, rationality, and legality of the business at hand" (Holstein 1993:35). Accounts reflect normative structures of the social setting and the audience (Mills, 1940;

37 Orbuch explains that while theoretically narratives and accounts differ in some ways, "the distinct meanings of these two concepts are often difficult to disentangle" (1997:467-68). I use the two words interchangeably.

Sykes and Matza 1957; Scott and Lyman 1968), and are most persuasive when they incorporate prevailing normative frameworks (Orbuch 1997).

Certainly the death penalty specifically, and penality generally, are embedded within larger normative systems. Christian beliefs, for example, have also been intertwined with the death penalty since the American colonial era. Executions are seen as a catalyst for the prisoner's religious renewal and redemption (Banner 2002; Mason 2006). The ascendance of retributive punishment policies meant a return to older ideas of law-breakers as evil, rational, and exercising free will unconstrained by a broader social context (LaChance 2007:703-704; Garland 2001:184). American penality is also suffused with popular desires for suffering by lawbreakers. Because they are fundamentally bad people, they deserve harsh punishment, and the popular legitimacy of the death penalty relies heavily on this strain of retributive animus (LaChance 2007:703-704; Sarat 2001). Particularly in Texas, the death penalty is seen as a legitimate and desirable punishment for murderers (Vollum et al. 2004).

While constitutionally important, appeals by death-sentenced prisoners are often portrayed as frivolous and manipulative (Amsterdam 1999 (analyzing language Supreme Court uses to denigrate and dismiss death row appeals); Wallace 2006: 728 n.222 (Congressional criticism of capital appeals); Alper 2011:881 n.83 (media criticism of capital appeals)). At the same time, the American death penalty is also informed by larger cultural and legal narratives of due process, rights, autonomy, and the sanctity of the individual (Garland 2010).

Based on the sociological research, one would expect prisoners' death-seeking narratives to use a "vocabulary of motives" to reduce their perceived deviance. Narratives expressing an acceptance of the death penalty grounded in one (or more) stock penal scripts, and/or invoking a right to choose that punishment could accomplish that task.

Narratives not only reflect cultural norms and hegemonic beliefs, but they are also constructed by social processes that can "conceal the social organization of their production and plausibility" (Ewick and Silbey 1995:214). In other words, the legal process constructs narratives by creating and following rules that privilege certain narratives and obscure others. Ewick and Silbey cite the Supreme Court's 1987 decision in *McCleskey v. Kemp* as an example. In that case, the Court refused to connect the individual case with broader social patterns when it rejected a statistical study of racial disparities in the administration of Georgia death penalty. It instead focused on a narrative of whether the prosecutor or jury had engaged in racial discrimination. The Court then demanded evidence of the jurors' thought processes that, by legal rule, are specifically shielded from judicial review. Therefore, legal claims about racist prosecution of the death penalty could thereafter only prevail if they mustered evidence about an individual prosecutor's racist conduct in the case at bar. The fact that statistical evidence demonstrated the importance of race in determining who was sentenced to death in a particular jurisdiction did not matter because the legal rules deemed that information irrelevant. This transforms the legal story of racism and the death penalty. The

organization of the legal process thereby produces a certain kind of story that becomes taken for granted (1995:215, 217).

Based on Ewick and Silbey's insight, this paper analyzes the prisoners' narratives, as well as the ways in which the legal system relies on rules and practices that promote the plausibility of the prisoners' narratives by concealing other information. Whereas Ewick and Silbey accomplished this through a kind of "top down" approach – that is, they showed how a high court decision can organize the social reality of a death penalty case by deciding what evidence counts – this paper instead adopts a "bottom up" inquiry, exploring how the combination of cultural beliefs, legal rules, and forensic practices also contribute to court narratives.

FINDINGS

Contents of accounts

Of those 20 EHs[38] for whom I found court accounts for their decisions, I identified four commonly recurring themes. They are similar but not in all ways identical to those identified in Chapter 5. Twelve said their execution was fair and appropriate for their crime. Another twelve (and one by inference) sought execution because death was preferable to continued life on death row. Ten framed their decision as an assertion of

[38] These prisoners were Robert Atworth; Richard Beavers; Richard Foster; Aaron Foust; Joe Gonzales, Jr.; Larry Hayes; Ynobe Matthews; Alexander Martinez; David Martinez; Steven Morin; James Porter; Steven Renfro; Michael Rodriguez; Charles Rumbaugh; Danielle Simpson; James Smith; Richard Smith; Benjamin Stone; Christopher Swift; and Charles Tuttle. Although the state courts refused to permit Larry Hayes to waive his appeals, I included him in this study because the trial court found him mentally competent in making a knowing, intelligent and voluntary waiver of his appeals.

their rights. Eight cited religious beliefs. These explanations were not mutually exclusive.

Death penalty as a fairly imposed and/or appropriate punishment

Twelve EHs endorsed capital punishment as a correct punishment, whether for legal or moral reasons (and often both). Texas's first EH – Stephen Morin – stated simply: "I've been convicted. I accepted the Court's ruling on that, and I ask the Court to proceed" (RR 25:3). Benjamin Stone wrote: "I am satisfied with my sentence and find no error in my trial. Therefore, I am requesting that the Death Warrant be issued in order for the sentence to be carried out" (Oct. 10, 1996 letter to TCCA). Richard Beavers stated simply: "I have a debt to pay and I'm ready to pay it" (March 2, 1994 hearing at 13). Alexander Martinez emphasized the link between dropping his legal appeals and taking moral responsibility for his offense in asking the trial court to "help me in moving my appeals faster so that justice may be served fully to its extent. I am not retarded and eccept [sic] my punishment as given" (Aug. 10, 2004 hearing, Exh. 2 at 3). None told the court, as Charles Rumbaugh wrote just prior to execution: "Just as the State of Texas has indicted me for the offense of Capital Murder, so do I indict each and every adult citizen of the State of Texas for the premeditated murders of nine men thus far, and further, for conspiring to murder over 200 others who are now incarcerated under sentence of death" (Crawford 2006:Appendix I).

In addition to those who explicitly connected their executions with their crimes, some prisoners asserted they would pose a future danger – a criteria for sentencing an

individual to death in Texas (Texas Code of Criminal Procedure Art. 37.071) – if not executed. Two told the jury they would be violent in prison (Gonzales RR 7:230-31; Renfro RR 28:3671), and another communicated his dangerousnessness during his competency evaluation (A. Martinez, Aug 10, 2004 hearing, Exh. 2 at 5). While not directly stating that the death penalty is an appropriate punishment, these assertions implicitly endorse one of its fundamental premises.

None asserted innocence in court,[39] and 11 stated they were guilty.

EHs also generally, but not always, refrained from criticizing the legitimacy of the death penalty appeals process.[40] Those few prisoners who referred to their lawyers generally expressed their appreciation or emphasized that their decision to waive appeals was unrelated to dissatisfaction with their lawyer (Gonzales *pro se* appellate brief at 4; Tuttle, Dec. 1997 letter to trial court; Atworth CR 46-47). Where the record reflects a

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39 Because I have only the court's order and not the hearing transcript, I did not count Richard Foster in this category. In his waiver hearing, however, Richard Foster apparently stated that he had not committed the murder intentionally, making his offense a non-capital murder (Texas Penal Code Ann. §§19.02, 19.03). The court notably emphasized the fact of his admission, however, rather than his legal innocence: "Before this court and in this hearing, Foster, apparently for the first time, admitted that he had committed the crime, claiming only that the taking of the decedent's life during the commission of the robbery was not intentional" (Foster v. Johnson, March 14, 2000 Order at 3). James Smith asserted variously that he was guilty and not guilty during his trial, but during his successful effort to expedite his execution, Smith did not speak of his guilt or innocence. By contrast, in his final statement, Smith stated he was innocent (Crawford 2006: Appendix I).

40 James Smith explained he "did not want to be involved in what I perceive to be a farce and a sham of the appellate procedure," which "only works to accumulate lots of money for the state from the people … it's obscene… it's done by the courts and the legislatures at the expense of the inmate who is subjected to sub-human conditions…it's physical and psychological abuse" (Smith, May 18, 1990 competency evaluation). Swift speculated that the trial judge wanted him to appeals because "death penalty appeals may provide greater pay than normal cases" (Swift letter to CCA, July 30, 2005 at 3). Danielle Simpson complained that "the way the appeals process is…there is really no such thing as the law because the way I see it, they're going to do what they want to do regardless (June 9, 2009 hearing at 31-32). Perhaps predictably, none of these three are included in the "death penalty as a fairly imposed and/or appropriate punishment" category.

few prisoners making statements about the pointlessness of appeals, they generally discussed this only with the mental health evaluator (Tuttle, J. Smith, and A. Martinez), and one lawyer put it in a pleading (D. Martinez). Another prisoner (Simpson) emphasized in his live testimony that futility was not the primary reason for his desire to waive appeals; he simply did not want to continue living on death row while on appeal. By contrast, in addition to the 11 who asserted they were guilty, four described their trials as fair. Another four asserted further appeals would waste taxpayer money. Hayes and Tuttle emphasized the victims' survivors need for closure, and Swift reminded the court that the victims' survivors had expressed at trial their desire that he receive the death penalty (Hayes, July 6, 2000 hearing at 7; Tuttle, Dec. 22, 1997 McNeel letter at 3; Swift, Feb. 2, 2006 hearing at 19).

Death was better than continued life on death row

One prisoner, Richard Smith, sought to abandon his appeal after receiving a diagnosis of terminal kidney cancer. Another 12 prisoners said they simply could not "do time" or found death row particularly difficult. Life on death row is hard without a doubt (Arriens 2005; Jackson and Christian 1980). James Smith described conditions as "subhuman" (May 18, 1990 competency evaluation). Another complained about the tedium of death row, but also stressed "how frightful and 'hazardous' his condition is while he has been in TDC….[H]e is fearful of bodily harm on a daily basis" (Tuttle, McNeel report at 7).

Danielle Simpson wrote the Fifth Circuit:

> "Kill Me".!!
> …
> [B]eing locked up in a [sic] isolated solitary cell of confinement 23 and 24 hours per day isn't justice nor is it considered living – its [sic] cruel and unjust, therefore I'm really looking forward to my execution because its just "me against the world". . .(*Simpson v. Quarterman*, Aug. 12, 2009 opinion: 2, 4).

More commonly, prisoners (N=12) echoed Foust's complaint that life in prison is not a life: "I am just ready to hurry things along, you know. Prison is not really the place to live. It's not like living out in the world, you know. It's not really a life, and that's my sentence, so I am ready to speed it up" (Foust, July 16, 1998 hearing at 4).

Assertions of rights and autonomy

These emerged in ten narratives. Stephen Morin "demand[ed]" an execution date (Nov. 10, 1983 letter to trial court). Steven Renfro told the court and jury that he believed he should have the choice between life in prison or death (RR 28:3664). More commonly, however, these prisoners invoked their real or imagined legal rights. For example, Aaron Foust wrote, "sir, I do believe it my right to die as soon as possible" (Letter to trial court, filed June 10, 1998). Benjamin Stone asserted: "I see no reason for not being allowed to represent myself on this or any other matter on my own behalf under my Sixth Amendment right" (Oct. 10, 1996 and Jan. 11, 1997 letters to TCCA).

One mental health evaluator drew on conventional notions of criminality in explicitly ascribing this reasoning to one EH:

> In some bizarre way, consistent with his life-long, maladaptive, sociopathic behavior, he has chosen to die prematurely because, in this examiner's opinion, in all medical probability, it is the only thing that he can control now that will render the efforts of his counsel and the legal

> system ineffective and futile (A. Martinez, Aug 10, 2004 hearing, Exh. 2 at 5).

These claims for authority and autonomy were much more common in correspondence with the court, rather than in face-to-face hearings. Consciously or not, the prisoners may have recognized that in seeking the sovereign's permission, they were better off acceding to its power rather than insisting that the court recognize that they have rights and claims requiring respect and accommodation. James Scott Porter, for example, who sent unusually abusive, coarse, and threatening letters to the TCCA demanding to halt his appeals, ultimately failed in waiving his appeal. The TCCA instead simply affirmed his conviction and death sentence after considering the appellate briefs filed by his lawyers, making no comment or ruling on Porter's right to waive those appeals.[41]

Christian beliefs

Eight of the EH accounts cited religious beliefs, with six incorporating Christian beliefs regarding spiritual rebirth, the divine forgiveness flowing from that experience, and heaven.[42] Charles Tuttle "state[d] that he is a Christian and he has found peace with his belief in the hereafter and sees that as his only reasonable and logical way out and

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41 This outcome resonates with Schmeiser's observation that EHs "may not evince the sort of narcissism that threatens to usurp legal prerogative, but must demonstrate an autonomy that recognizes and properly internalizes law's authority. A volunteer who flouts legal authority ceases to be a proper executable subject, so adjudicative processes must reaffirm law's dominion over death" (2011:103). Porter met with greater success in federal district court where he was permitted to waive his appeals after a hearing at which he explained his desire for execution was a product of this religious beliefs (*Porter v. Dretke*, Jan. 30, 2004 hearing).

42 Ynobe Matthews' religious affiliation was not clear from the court documents. James Smith was a Hare Krishna.

wants to accelerate that time frame" (McNeel report at 3). Porter explained to the federal district court: "my salvation, God, is more important than this physical body" (*Porter v. Dretke*, Jan. 30, 2004 hearing at 28-29).

Beliefs about heaven made prison life even more unappealing (*Simpson v. Quarterman*, June 9, 2009 hearing at 18-19). Christopher Swift saw his death as a way to reunite with his victims (his wife and mother-in-law) (Supp. CR 39). Further, the afterlife had to be better than his current existence, which he "emphasized [as] plagued by dissatisfaction and turmoil" (Supp. CR 39). Swift also anticipated that heaven would deliver him from the pains of his schizophrenia (July 30, 2005 letter to TCCA at 3). Perhaps less confident in his destination after death, Ynobe Matthews framed his desire to drop his appeals as part of his spiritual evolution and resulting desire to turn his fate over to divine authority: "I believe I done come to grips with my religion and with God, and I think that I'll just let me and him deal with this now" (11.071 CR 162).

The Process Generating These Accounts

While EHs plainly hew to certain conventional narratives, Ewick and Silbey remind us to look more broadly at how the legal system structures the production of these accounts. As described below, these prisoners' accounts emerge from a legal process that minimized conflict, and even inquiry, into deviance-increasing, rather than deviance-decreasing, narratives.

Assessments of mental functioning were subjective, truncated, and minimized mental dysfunction or distress

By the time the EH appeared before the court to waive his appeals, he had been tried, convicted and sentenced. Embedded within each step were explicit or implicit jury findings of sanity at the time of the crime, and at least for cases tried after 1991,[43] no evidence of mental dysfunction sufficient to persuade the jury to impose a sentence less than death. Further, due process prohibits trying criminal defendants while they are mentally incompetent, and the court has an independent responsibility to inquire if it has bona fide doubt as to the defendant's competence, even if the criminal trial is underway (*Medina v. California* 1992; *Drope v. Missouri* 1975; *Pate v. Robinson* 1966).

The judge considering the prisoner's request is usually the same judge who presided over the trial, and while the cumulative momentum of those determinations may not be expressed, the trial judges in these cases freely drew on their observations of the prisoner during the trial in concluding the waivers met the legal standards (R. Smith, May 14, 1999 hearing at 3; Tuttle, Dec. 12, 1997 hearing at 7, 60).

In some cases, no mental health expert was consulted. Two prisoners were simply asked by the judge whether they had a history of mental illness (Foust, July 16, 1998 hearing at 6; Matthews, Sept. 17, 2002 hearing at 165-166). Where mental health

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[43] Prior to 1991, Texas juries were generally instructed to answer only two questions on capital sentencing, one asking whether the defendant's homicidal conduct had been committed "deliberately," the second asking whether the defendant would likely be a danger in the future. The special issues were modified in 1991; the deliberateness question was removed, and a new question was added to enable juries to consider broadly evidence that mitigated the defendant's moral culpability (Abdul-Kabir v. Quarterman 2007; Texas Code of Criminal Procedure Art. 37.071).

evaluations were conducted, only three used a standardized competency assessment tool (Atworth, 11.071 CR 44; Porter, Nov. 3, 2003 Scarano Report; Swift S-CR 37) Instead, they relied heavily on interviews with the prisoner, including for the prisoner's mental health history. In addition to the significant stigma of mental illness, EHs know that perceived mental competence is essential for them to waive their appeals. In his December 1997 letter to TCCA, Tuttle wrote, "Moreover, I am competent to make this decision, as I am sure the trial authorities will recognize." Hayes wrote, "I understand psycological [sic] testing will be required before this can be done and I am ready and willing for this to be done any time" (July 5, 2000 letter to TCCA). The prisoners, therefore, have ample reason to understate any history of mental dysfunction.

Christopher Swift, whom a court-appointed psychiatrist had previously found insane at the time of the crime (CR 165), was the sole source of information for his mental health assessment at the time he sought to waive his appeals. Swift acknowledged his schizophrenia, but emphasized that he was much better than he was at trial when he was beset by auditory hallucinations. The hallucinations "don't lead me to hurt myself or others" and the "voices are significantly less intense, frequent and meaningful" (Supp. CR 40.) After his evaluation, he wrote a frantic letter to the TCCA, explaining that he "had been manipulated into giving an interview which could potentially destroy my chances of foregoing an appeal(s)" (Supp. CR 63). At the subsequent hearing on his competency, he clarified: "At the time of my examination with Dr. Martinez I believe six or more months ago, I confessed that to a small degree I still heard strange voices

although these voices did not dictate my actions. Since that time and thanks be to God and my Christian friends who have encouraged me so, I have been freed completely from these voices" (Feb. 2, 2006 hearing at 19).

Joe Gonzales, Jr. described his previous experience with psychiatric treatment as undertaken solely to appease his fiancée, with headaches as the only lingering sequelae to a month-long coma he experienced after a car accident (CR 47). These assertions were never explored beyond Gonzales's representations (CR 46, 50). In Danielle Simpson's case, the examining psychiatrist never corroborated Simpson's claim that he was given Thorazine, a powerful antipsychotic used to control mania, only as a sleep aide (National Library of Medicine 2011; June 3, 2009 Price report). Alexander Martinez forbad an examiner from contacting any of his intimates, and the examiner complied (Aug. 10, 2004 hearing, Exh. 2 at 1 ("Mr. Martinez refused to allow this examiner to contact individuals who were familiar with him or his current situation. After reviewing his records and evaluating him on two occasions, this examiner decided to comply with his demands"). Not only were the mental health evaluations based primarily (and sometimes solely) on the information the prisoner sought to present during the interview, but some examiners also failed to consider readily available information from other times in the prisoner's life, such as mental health evidence presented at trial. One evaluator, for example, reflected no awareness of psychological evidence presented at trial regarding a prisoner's brain impairment, history of head trauma and very serious drug abuse, as well

as his history of depression, anxiety, guilt internalization, fear, and distress (Tuttle, Appellant's brief at 25).[44]

These examples contrast sharply with a federal court hearing in Arizona in which a psychiatrist spent over 50 hours over a 11 month span in "in depth, broad range, and comprehensive sessions with [the Arizona EH] revealing his life, his mental status, observing and assessing his ability to process information, looking at his mood and … the modulation of his mood in response to various situations that arouse, looking for consistency and symptoms or behaviors over time;" interviewed personally "a number of people directly who would have had the short and long-term opportunity to review [the prisoner's] mental status;" and used contrary opinions of another psychiatrist to test and review her own professional opinion (*Comer v. Stewart* 2002:1040, 1053).

The anguish of incarceration and life under a death sentence are also understated, even by the prisoners. While a few prisoners were somewhat plaintive, most offered the court only thin descriptions of what made life in prison unbearable. They did not present accounts of suffering designed to evoke compassion, a common narrative in the context of physician-assisted suicide (Hillyard and Dombrink 2001). Their accounts left undisturbed assumptions about how prison has to be. Suffering in prison has become normalized, and even desirable, within the highly retributive American penality (Ribet 2010; Cusac 2009). It is an "illegitimate" and deserved pain (Kenney and Slowey 2010). That death-sentenced prisoners require special – and especially oppressive – prison

[44] The evaluator's report was based on a two-hour interview with Tuttle and a letter Tuttle wrote to the court seeking to waive appeals (Tuttle Supp. CR 4:1)).

housing is all but unquestioned (Ferrier 2004). The pains of life in isolation confinement and under a death sentence have been documented (Oleson 2006; Arriens 2005; Johnson 1990). While recording the prisoners' distress in living on death row, the mental health evaluations of EHs did not address the psychological and psychiatric consequences of living under a death sentence or on death row. Instead, this distress became part of the narrative of rational choice, rather than an exploration of the conditions that cause suffering (*See* Atworth 11.071 CR 47; *Simpson v. Quarterman*, June 9, 2009 hearing at 26; Rumbaugh 1985:401).

Conceptual frameworks of free will

Texas courts relied on the standard language and conceptual framework of guilty pleas in determining the voluntariness of these waivers, even though courts have acknowledged the possibility that prison conditions could coerce a waiver (*Comer v. Stewart* 2000; *Smith v. Armontrout* 1987; *Groseclose ex rel. Harries v. Dutton* 1984). Judges simply asked the prisoner whether some individual forced the prisoner into his decision ("Based on Defendant's statements, **no one** has coerced or persuaded Defendant to make his request" (Hayes, July 6, 2000 hearing at 9); "All right, has **anyone** threatened you or forced you in any way to answer any of my questions that I have asked you today?" (Stone, June 19, 1996 hearing at 5-6). As Ewick and Silbey noted, legal narratives prefer situating the litigant as an autonomous actor, removed from broader social forces (1995:217). These legal narratives about the voluntariness of the prisoners' decisions are no exception.

In addition, the way in which problematic prison conditions were presented in the course of the EHs' legal process, the courts had no power to address what may be genuinely unconstitutionally cruel and unusual conditions of confinement. Not only was the legal vehicle incorrect – the prisoner, after all, was not filing suit to reform his prison conditions – but, because of legal ethical rules discussed below, the prisoner's counsel may have been reluctant to present to the court evidence about particularly painful or degrading prison conditions that would make the prisoner's decision look more like a statement of suicidal despair.

Non-adversarial litigation

None of the successful Texas EHs appears to have had an adversarial hearing in which, for example, counsel marshaled lay and expert witnesses to attack assertions that the prisoner was competent and waiving his rights knowingly, voluntarily and intelligently.[45] This may be attributable at least in part to legal ethics rules that ostensibly limit the lawyers' role, as well as a broader, less adversarial Texas legal culture.

The legal ethics of representing a EH are the subject of considerable debate within the legal academy (Oleson 2006; Mello 1999). This study found that, though they expressed discomfort in enabling their clients' execution, and many sought to dissuade

[45] In two cases (Swift and Rodriguez), counsel actively advocated against their clients' wishes in the course of the hearing on the waiver, but in both cases, counsel relied primarily on legal argument. Through cross-examination they challenged some evidence, but they presented no evidence or experts of their own. According to a press report, Stephen Morin's counsel sought a stay of execution to raise the issue of mental competency, but the trial judge, based on his observations of Morin, concluded Morin was mentally competent and refused a hearing (Crouse and Donahue 1985). Ramon Hernandez' trial counsel unsuccessfully sought a stay of execution as a "next friend." Hernandez' former counsel argued that Hernandez' waiver was based on a mistake of law, not mental incompetence (*Lovelace v. Lynaugh* 1987).

their clients from waiving appeals, in practice lawyers generally saw themselves as bound by the client's wishes (Foust, Oct. 6, 1998 Ford letter to TCCA; Tuttle Jan. 9, 1998 hearing at 7, 43-44). This reflects the most straightforward reading of the Texas legal ethics rules, which require lawyers to act as their client's agent, except where the lawyer is convinced of the mental incompetence of the client.[46] The Texas Disciplinary Rules of Professional Conduct require that, under most circumstances, "a lawyer shall abide by a client's decisions… concerning the objectives and general methods of representation" (Rule 1.02 (a) (1)). If the lawyer doubts the client's competence, she is instructed to seek the appointment of a guardian (Rule 1.02 (g)). If she does not do that, however, she is required to accede to the wishes of her client. The rules do not require a lawyer to obtain any kind of mental health evaluation of the client before concluding the client is not mentally competent, nor do they require the lawyer to demonstrate any proficiency in assessing the client's mental competence.[47]

Once counsel decides her responsibility is to advocate on behalf of the client's goal – here, execution – no evidence will be tested. She cannot, and the attorneys for the State may be reluctant or unprepared to do so. Further, the Disciplinary Rules restrict the

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[46] One possible way out of this ethical quandary would be for courts to appoint counsel to represent the prisoner in seeking to waive his appeals, as well as counsel to challenge the legality of the waiver (*State v. Ross* 2005; *Comer v. Stewart* 2002; *O'Rourke v. Endell* 1998; *Mason By and Through Marson v. Vasquez* 1993).

[47] Just as I do not second-guess the courts' decisions in these individual cases, I do not question here any of these attorneys' assessments of their clients' ability to waive appeals, nor do I discount the difficulty of the decisions they confronted in dealing with a death-seeking client. That is not the focus of this article. Although it may be possible to establish a legal standard for waivers that safeguards both the prisoner's and the legal system's interests (Blume 2005), here I present the current legal framework, which is premised upon principles of an adversarial system, within which these attorneys act.

information an attorney may disclose regarding her client (Rule 1.05). In Danielle Simpson's hearing, the State's attorney was the first to stumble upon the inconsistency between Simpson's courtroom testimony about his history of anxiety and depression medications and what he told the examining psychiatrist. (The State's lawyer promptly terminated this line of questioning.) As noted above, no one questioned Simpson's assertion that he was prescribed an antipsychotic solely to help him sleep. While all lawyers are bound by an ethical duty to act with "candor toward the tribunal," in the context of execution-hasteners, that responsibility is met by "not knowingly … mak[ing] a false statement of material fact …to a tribunal … or offer[ing] or us[ing] evidence that the lawyer knows to be false" (Rule 3.03(a)). The lawyer only "knows" a fact is false if she has "actual knowledge of the fact in question" (Texas Disciplinary Rules of Professional Conduct "Terminology"). Without asking TDCJ physicians whether they had prescribed Thorazine for sleep – a fact apparently not in the client's interest – the lawyer may not have actual knowledge that this contention was false, and she may believe it is disloyal to the client to investigate.

Further, counsel's ethical confusion is situated within Texas' legal culture, which historically has neither promoted nor funded the kind of aggressive adversarial litigation more common in other states (Steiker and Steiker 2006; Texas Defender Service 2000 and 2002). Some publicity has surrounded Texas death sentences that were upheld despite compelling evidence that the defense lawyers in those cases were asleep or addicted to drugs and alcohol during trial (Duggan 2000). These cases represent only

particularly colorful instances of Texas' systematically casual attitude toward capital legal process. As Steiker and Steiker (2006) outline, until 1995, death-sentenced prisoners were not appointed counsel to investigate and prosecute state habeas appeals, even as trial judges set execution dates to move the litigation along. After state law changed in 1995 to provide counsel, courts provided limited funds to pay counsel and to fund investigation and consultations with experts. No mechanism exists to help prisoners whose court-appointed lawyers failed to provide competent representation. Courts – especially state courts – rarely order hearings at which they can observe witnesses and rule on their credibility before adjudicating disputed facts. The lower courts generally decide the case based on the documents submitted by counsel, and rule on the case by adopting verbatim a proposed order drafted by the State's lawyers. The reviewing court usually issues a one-page order adopting the lower court's order without comment. Prisoners' lawyers almost never present oral argument during the state habeas process, and on direct appeal, where the reviewing court sets a date and time for oral argument, the prisoners' lawyers are permitted to – and do – waive their opportunity to present their arguments to the court and answer the court's questions (Steiker and Steiker 2006:1880-89). Some Texas condemned prisoners have more extended legal proceedings by some combination of aggressive counsel, less aggressive prosecutors, thoughtful (or slow to act) judges, and luck. However, as Steiker and Steiker observe:

> [T]he legal process that follows the return of a death sentence is far more likely to be nasty, brutish, and short. Counsel are less likely to file substantial briefs; reviewing courts are less likely to hold hearings; and

> the entire process moves much more quickly, often expedited by the early setting of execution dates (2006:1915 (footnotes omitted)).

Certainly in the EH cases, the prisoners' lawyers do not *appear* to have interrogated the complexities and limits of their ethical responsibility toward their clients. The court records do not reflect motions for appointment of unconflicted counsel. Similarly, the court records do not contain motions for the appointment of their own mental health expert to advise counsel, and instead the only experts involved in the case reported to the court. The general failure to contest the assessments of the court-appointed mental health professionals (with, *e.g.*, experts or lay witnesses of their own) may stem from their interpretation of their duty to their clients, to evaluations and consultations that were never made part of the court record, or simply the low standard for legal competency. However, in light of the complete absence of any adversarial proceedings in any of the successful EH cases, it is impossible to discount the influence of this larger legal culture.

Judges also participate in and shape this legal culture. In *Beavers*, the prisoner's appointed counsel argued strenuously for production of Beavers' psychiatric records prior to determining his competency. In addition to denying the motion, the court treated the lawyer with impatience and irritation and enjoined him from any further contact with Beavers (March 2, 1994 hearing). Another judge told a lawyer seeking a psychological assessment of her client's competency that he was not sure she was legally entitled to do so: "The Court is having problems finding that [the attorney] even has standing in bringing the Application for the Writ [raising the concern about competency] in that Mr.

Barney has made statements quite contrary to the matters raised in the Application for the Writ" (Barney, March 11, 1986 hearing at 5). While the court records do not reflect, *e.g.*, counsel's motions for their own expert, judges may have discouraged counsel off-the-record from filing these motions by communicating that any motions for funds to retain experts would be denied.[48]

Given the fact that legal competency is seen as a low legal standard, one could argue that the lack of an adversarial culture is inconsequential – that is, a judge likely would have inevitably found the defendant competent to waive even with an adversarial process. However, a review of one outlier case – the only Texas case I have found in which the prisoner was found incompetent to waive his appeals – gives a glimpse of what can emerge in a genuinely adversarial process. In this singular case, counternarratives highlighting the social deviance of the request, rather than its normative conformity, emerged from hearing more information about the prisoner and persuaded the judge to deny his request.

In *Cockrum*, the prisoner's lawyers opposed the prisoner's efforts to drop his appeals and relied on conventional adversarial litigation techniques to overturn the conventional account (In re Cockrum 1994).[49] Cockrum expressed several reasons for wanting to waive his appeals, including some commonly cited by successful EHs. He

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[48] The Supreme Court in *Panetti v. Quarterman* (2007) criticized a Texas trial court for considering only evidence from experts it appointed and for failing to appoint mental health experts to assist a habeas petitioner who, according to his counsel, was incompetent to be executed.

[49] Perhaps significantly, attorneys associated with a specialized death penalty defense organization were "heavily involved" in the litigation of this case (personal communication with subsequent counsel for Cockrum, Mandy Welch (9/9/11)).

believed in capital punishment; his trial and appeals were fair; any further litigation was for delay and not reversal; continuing his appeal would be frivolous and harmful to those death row prisoners with meritorious claims; and continuing his frivolous appeal was a waste of public funds (1994:488). Crucially (and enabled by Cockrum's lawyers' evidence and advocacy), the court did not simply take Cockrum's explanations at face value. Instead it examined them critically, concluding, for example, that "[a]lthough it may be rational in certain circumstances for an individual to conclude, based on his own acts and culpability, that he deserves the death penalty, the evidence demonstrates that the applicant has a different reason for wanting to die" (1994:492). Through their own experts and evidence, Cockrum's lawyers created an alternate narrative that highlighted distress and suicidality. Where the court-appointed mental health experts had ruled out post-traumatic stress disorder (PTSD), in court, they agreed that Cockrum had been exposed to stressors that could have led to PTSD, namely the circumstances of his father's death, his violent victimization in childhood, and (in marked contrast to the other EH cases) his time on death row (1994:486 n.2). The PTSD frame enabled the judge to revise his understanding of Cockrum's courtroom manner as the product of PTSD's "restricted affect." Cockrum's efforts to circumscribe inquiry into his father's death were seen as symptomatic of his mental distress, and consistent with an effort to suppress evidence of his symptoms in the course of the competency evaluations (1994:487).

Where the court-appointed experts found no suicidal thoughts, the court was persuaded by the experts presented by Cockrum's lawyers and their articulation of "a

broader range of self-destructive behavior, which [the psychiatrist] termed 'passive suicide,' and which they maintain has been life-long pattern for [Cockrum], continuing through his present desire to waive further review of his death sentence" (1994:492). The federal district court opinion explicitly situated Cockrum's request to waive review within this larger framework: "The applicant's tragic personal history was universally viewed as critical to a determination of his current competency to waive further review" (1994:484). The court described Cockrum's violent, abusive father, early use of illegal drugs, delinquent behavior, and identified a crucial turning point in Cockrum's life: when Cockrum shot his father during one of the father's abusive episodes. The father eventually died of his wounds, but told authorities that the shooting was an accident. Cockrum was never prosecuted, but in the court's view, this event weighed heavily on Cockrum in the years following, and led to his marital instability, escalating drug use, suicide attempts, and ultimately the drug-fueled murder that landed him on death row (1994: 485-86). Even though *Rumbaugh* makes clear that neither suicidal thoughts nor actions are necessarily contrary to legal competency, the court in *Cockrum* refused to find Cockrum competent to waive appeals.

Cockrum's case suggests aggressive, independent litigation could affect the narrative produced by the legal process. Certainly, a lawyer may not always be able to change the narrative, whether because she lacks resources to obtain expert assistance, because diligent investigation of the client's situation reveals no viable alternative explanation, or because the court simply does not want to hear one. Cockrum's case

serves as an example, however, of the ways in which a non-adversarial legal process can obscure more complex EH narratives.

SUMMARY AND DISCUSSION

I found that EHs most commonly used four themes to try to win permission to drop their appeals: the death penalty was a fairly imposed, appropriate punishment; the prisoners had a right to make this decision; death was better than continued life on death row; and Christian beliefs made them want to expedite their deaths. These accounts are grounded in narratives of the moral legitimacy of the death penalty. The system's success in convicting only the guilty spares the court from endorsing the notion that the appellate process was a meaningless and futile exercise for death-sentenced prisoners. Their embrace of the fairness and justness of their death sentences, particularly when combined with fundamentalist Christian beliefs, reaffirms deeply rooted ideas that some crimes deserve the death penalty and that the death penalty spurs spiritual redemption. The Christian narrative also helps mute concerns that the prisoner (rather than God perhaps) seeks to take away the power to punish from the courts. In addition, they "demonstrate[e] obeisance to law" because "the prisoner's desire is not for death *qua* death but for responsibility and recompense" (Schmeiser 2011:75).

For a prisoner to voice the brutishness, pointlessness, and hopelessness of prison gratifies popular retributive preferences for prison life (Mason 2006; Garland 2001; Clear 1994). That the convict's incorporation of those aspects into his narrative could be persuasive to a judge (especially a popularly-elected state court judge) is unsurprising.

Narratives that emphasize the pains of imprisonment safeguard a retributive return otherwise diminished by a consensual execution. At the same time, these prisoners' invocation of their legal rights and autonomy enables courts to frame EH requests as an opportunity to demonstrate a cultural commitment to the sanctity of the individual. Recognizing some fundamental autonomy of the condemned – while having formally denied him the right to live – is consistent with important cultural and legal imperatives, but is also somewhat unexpected in light of broader hegemonic ideas of the criminal and the efforts in capital trials to dehumanize the defendant and construct him as monstrous and fundamentally other (Garland 2010:95-96; Haney 2005:141-161).

This contradiction may explain some courts' efforts to transform the EH's identity. Some judges complimented the prisoners on their courtroom manner, intelligence, or articulateness, signaling that these are the "good" death row prisoners. One judge remarked that the letter the prisoner sent seeking to waive his appeals was "probably one of the most rational, concise, articulated expressions of opinion that a defendant has sent to the Court regarding his case that I've ever received. And I've been on the bench for thirteen years" (Tuttle, Jan. 9, 1998 hearing at 7). In at least two cases, the judges deviated from well-established courtroom norms for adult litigants by referring to the prisoners repeatedly by their first names (Gonzales RR 2:12, RR 6: 2, 4, 5; Beavers, Aug. 3, 1993 hearing at 8, March 2, 1994 hearing at 16, 25-26).[50] The judge in

[50] Judges have a duty to maintain courtroom decorum by treating participants with dignity and courtesy (Alfini et al. 2007:3-1-3-46). This injunction is generally understood to require addressing participants by their last names. *See, e.g.,* Travis County Courts as Law (2011) ("The Judge, the attorneys, and other officers of the court will refer to and address other court officers and other participants in the proceedings

Beavers' case positioned himself as the condemned's protector, asking him whether he wanted the attorney enjoined from communicating with him (Beavers, March 2, 1994 hearing at 10). (The attorney sought to delay the prisoner's execution date until documents pertaining to his mental competence could be obtained and reviewed). Perhaps by demonstrating commitment to norms of accountability and/or religious faith, some of these prisoners overcame the fundamental otherness ascribed to them. By speaking their commitment to mainstream values, they promoted their claims to autonomy (Duff 2001:76). At the same time, treating the condemned as childlike, vulnerable, and requiring the judge's protection against his attorney is in tension with granting only the adult and mentally healthy the privilege of autonomy.

Undergirding all these accounts are powerful narratives of rationality and free will. The prisoners' waivers must, after all, be mentally competent, knowing, and intelligent. Voluntariness is narrowly construed by separating the condemned from his environment. These legal rubrics square nicely with conventional views of criminals as calculating free actors and "reproduce[ ] the ideology of individualism" (Dunn and Kaplan 2009:265). In affirming these cultural constructions of the death-sentenced, these narratives help resolve anxieties about death-seeking and bypassing appeals in a death penalty case.

These accounts echoing stock penal stories are also noteworthy in what they do not do. Unlike Theodore Kaczynski (Mello 1999), these EHs do not assert radical or

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respectfully and impersonally, as by using appropriate titles and surnames rather than first names."); Rozier E. Sanchez Judicial Education Center of New Mexico (2011) ("Address all individuals by last name and appropriate titles in the public setting.").

subversive narratives. They do not, for example, claim they are prisoners trapped in a racist, rigged legal system that provides only notional due process and is incapable of truly administering justice. They do not say their anguish at their crime or their living conditions makes them want to kill themselves. Only two prisoners, Charles Tuttle and Michael Rodriguez, clearly expressed remorse at the time of the waiver.[51] Otherwise, only a few thin expressions of remorse made their way into the courtroom. Stephen Morin (for whom no competency hearing was apparently held) told the jury in closing argument at his trial, "I ask you to believe from the evidence that has been presented every penance is made or was made and there is a very deep remorse to what transpired." He then quoted Bible verses about God wiping away tears and eliminating "pain for the former things passed away." RR 23:133. The report on the mental health evaluation in Stone's case began with a description of why he sought to waive his appeals, citing his confession, continuous assertion of guilt, the fairness of his trial, his preference for death over live in prison, and not wanting to waste time on appeals. Finally, only on the last page (of three), under a section entitled "special preoccupations" that listed his annoyance with the jail conditions, his problems with drinking, his pride that drinking never interfered with his work, and his experience with occasionally hearing things that other did not, did the report state without elaboration that Stone "felt terrible about killing his ex-wife and her daughter" (Nov. 7, 1996 letter to court).

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[51] By contrast, at least three others expressed remorse in their final statements (Texas Department of Criminal Justice 2010).

Perhaps prisoners were afraid that expressing these feelings might make them appear driven to suicide because of guilt. Ben Stone responded to his attorney's request for a competency evaluation by saying, "I've already been given competency tests and stuff like that before trial to make sure I wasn't crazy. I know exactly what's going on. I'm not grief stricken. I'm not just doing this out of grief either" (October 30, 1996 hearing at 9). In addition, the court inquiry surrounding the waiver could marginalize expressions of remorse because it is focused on other legal questions. At Danielle Simpson's waiver hearing, the mental health evaluator was asked whether Simpson had expressed remorse or a sense of responsibility. The evaluator responded, "Well, the issue of the purpose of the execution, the purpose of his punishment, did not come up. I didn't ask that; he didn't express that" (June 9, 2009, hearing at 23).

The legal proceedings systematically minimized evidence that increased the deviance of the desire to die, particularly by marginalizing the discovery of evidence that could be linked to suicidality. These data reveal that the legal system – at least in Texas – did not complicate the EH narratives, instead reinscribing hegemonic beliefs through a non-adversarial process. Truncated mental health inquiries disconnected the prisoner's decision from his broader social and psychological environment. Formal ethical rules mandating the lawyer's loyalty to his client's goals, as well as through a generally non-adversarial legal culture limited alternative narratives. As *Cockrum* – the case in which a defense attorney successfully challenged his client's competency – makes clear, while

Rumbaugh created a legal rule, it did not necessarily overcome normative anxiety about desires to hasten death.

In sum, the narratives studied here trade in ideas of the death penalty as fair, deserved, and for some, soul-saving. Prison is so tough that it breaks even these criminals. And these narratives are those of criminals – rational and calculating – rather than of vulnerable, traumatized, mentally impaired individuals. As scholars of the sociology of accounts have observed, these accounts incorporate prevailing normative frameworks. At the same time, the legal process, itself embedded within these normative frameworks, contributes to narratives about the necessity and appropriateness of the death penalty by making contradictory narratives harder to see. Studying accounts in this context offers a window on how legal structures organize how narratives are developed even before courts are called to rule on their merits.

Chapter 7

Rights to Die

The normative confrontation *Rumbaugh* presents would not exist without legal standards defining as competent a prisoner who charges an armed law man in hopes of being shot to death. This chapter examines the "right" of death row prisoners to die, not to debate the doctrinal question of whether Gilmore and other execution-hasteners have such a Fourteenth Amendment right,[52] but instead to illuminate how the legal framework governing execution-hastening constructs the "executable subject" (Sarat and Shoemaker 2011). This chapter situates the practices discussed in the preceding chapter into a larger sociolegal framework. It argues that the overall legal framework facilitates execution-hastening by confining the legal rules of engagement to a narrow inquiry into competence and organizing the legal inquiry in a way that reinforces stereotypes of criminality. At the same time it denudes the legal discourse of arguments grounded in the broader social values, including those which promote the systemic legitimacy of the American death penalty through adversarial litigation.

Minding Garland's admonition for sociologists to identify the "intrinsic rationality" of the death penalty, this chapter also focuses how the EH legal framework makes sense in the context of execution-hasteners and extends Garland's theory

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[52] For discussion of whether death-sentenced prisoners have such a constitutional right, see Dama 2007; Milner 1998; Johnson 1991; Urofsky 1984). An analysis of their reasoning is beyond the scope of this chapter, but data from this study and others invites another look at their reasoning. For example, they generally presumes execution is essentially inevitable for individuals sentenced to death, and they presuppose a higher level of judicial scrutiny of the convictions and sentences of execution-hasteners than is occurring, at least in Texas.

regarding the role of rules and rights in death penalty (Garland 2010). In addition to providing insight into the operation of the American death penalty, this chapter also highlights the importance of examining the sociolegal context in which rights – here, the right to die – are embedded. Comparing the legal approach to rights to die of those with terminal illness and those who seek to expedite execution offers a window onto a differential "process of collective definition" (Blumer 1971) of desires to hasten death, and reveals how historical contingencies, normative beliefs, and different legal logics can shape legal responses to demands for rights.

THE RIGHT TO DIE HELD BY TERMINALLY ILL PATIENTS

Beginning in the mid-1970s, state courts, based on legal theories of informed consent, right to privacy, and proscriptions against battery, concluded that competent individuals may elect to discontinue medical treatment, even if doctors believe it would cost them their lives (Eaton and Larson 1991). The Supreme Court then held in 1990 that a competent person has a right to refuse artificial nutrition and hydration even if that refusal would cause or hasten her death. The Court noted, however, that individual right is not absolute. Instead, it must be balanced against State interests (Cruzan by Cruzan v. Director, Missouri Dept. of Health 1990:269-70). [53]

The debate then moved from discontinuing life-sustaining interventions to permitting efforts to hasten the death of terminally ill patients. In *Washington v.*

[53] Prisoners' right to refuse medical intervention is less clear, and decisions involving prisoners appear to weight the state's interests more heavily (McNabb v. Washington Department of Corrections 2008; Freeman v. Berge 2006; Ross v. Emerson 2005).

Glucksberg (1997), the Supreme Court considered whether a Washington statute restricting a doctor's ability to prescribe medications to a terminally ill patient seeking to end his or her life violated the patient's right to die without interference from the State.[54] The Supreme Court considered whether individuals have a "fundamental" right to assistance in hastening death, and if not, whether the state's restrictions on the individual right were rationally related to its interest in limiting that right.

As recited in Chapter 6, the Supreme Court grounded its analysis not only in historical prohibitions on assisting others to die, it also in those on suicide. Further, and consistent with the framing of the issue as a Fourteenth Amendment claim, it conceived of the legal question as one which require balancing the individual's interests against the State's. Because the right for help in hastening death is not a fundamental liberty interest, the State could legitimately prohibit such assistance. The Court identified State interests commonly cited in cases involving the right to discontinue life-sustaining medical intervention: "preserving life; preventing suicide; avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; protecting family members and loved ones; protecting the integrity of the medical profession; and avoiding future

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[54] While the request to discontinue appeals appears analogous to a request to discontinue medical treatment, I use *Glucksberg*'s reasoning, believing it to be in fact a more apt analogy. Not only does abandoning appeals not necessarily entail execution (if a county does not seek execution, a prisoner can continue to live on death row after appeals have ended). Like the patients in *Glucksberg* and unlike those patients who simply seek to stop medical intervention and let nature take its course, if the county does not seek an execution date, prisoners must actively seek their own deaths, by, e.g., writing courts to demand an execution date. In addition, as Blume has noted, "the right to refuse life-saving medical treatment, assuming there is such a right, is grounded in the individual's right to bodily integrity, which is not at issue in the volunteer context. Furthermore, in the refusal-of-treatment situation, a third party does not have to take action to bring about the person's death, which again is not true in the volunteer context" (2005:947).

movement toward euthanasia and other abuses" (Washington v. Glucksberg 1997:728 n.20).

EXECUTION-HASTENING THROUGH THE LENS OF *GLUCKSBERG*

Less protective legal standard

Assessing competence and voluntariness

Justice Souter, in his concurrence in judgment in *Glucksberg*, cited the State of Washington's concern that the "right [to die] could not be confined to the mentally competent, observing that a person's competence cannot always be assessed with certainty" (755). Where other, more easily administered, state restrictions might be permissible,

> the lines proposed here (**particularly the requirement of a knowing and voluntary** decision by the patient) would be more difficult to draw… than the lines that have limited other recently recognized due process rights [that] were easy to make with a real degree of certainty. But **the knowing and responsible mind is harder to assess** (783-784) (emphasis added).

Justice O'Connor in her concurrence also expressed concern regarding voluntariness: "The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here" (738).

In the criminal justice system, these assessments regarding voluntariness and competence, far from being too uncertain to hazard, are made routinely. Courts assess voluntariness in every plea agreement, and adjudicate the competency of tens of thousands of men and women every year (Maroney 2006:1378). As Justice Thomas

observed for the majority of the Court in *Moran*, competence, at least in the context of the criminal justice system, is just not that big a deal. "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel" (1993:402). That the proceedings involve desires to hasten death does not alter the calculability of competence.

Preventing suicide

In upholding restrictions on this right to hasten death, the *Glucksberg* Court credited the State's interest in preventing suicide and noted the link between depression and suicide (730-31). The Supreme Court's sensitivity to suicide in this context contrasts sharply with its prior decisions involving execution-hasteners, and with data from the Texas execution-hasteners. Prisoners have higher suicide rates than non-prisoners, and death row prisoners have higher rates of suicide as compared to non-death row prisoners (Baillargeon et al. 2009; Tartaro and Lester 2008). Suicidality and depression featured in the Supreme Court cases on execution-hastening. The dissenters in *Gilmore* (1976), *Moran* (1993), and *Demosthenes v. Baal* (1990), among others, cited depression and suicide attempts in arguing against accepting the prisoners' waiver. In the Texas cases, at least 15 had a history of depression, and at least 14 had a history of suicidal gesture, ideation, and/or an elevated suicide scale.

Charles Rumbaugh's case is the most dramatic of the Texas courts' acceptance of depression and overt suicidality in death row prisoners' desires to hasten death, but he was not alone. Steven Renfro, another Texas death row prisoner, was described at trial as

having attempted "suicide by cop" at the time he was arrested. The State's psychiatrist interviewed Renfro for four hours prior to trial, and testified: "He made it clear that he wanted it to end it that day [of his arrest], to have been shot and killed. Renfro wanted to be and intended to be killed that night by the police officers [and] wants to die now" (RR 27: 3438, 3450, 3481). The defense psychiatrist at trial also found Renfro depressed and suicidal. In addition, he believed his suicidality preceded the homicide, and that he needed assistance in hastening death because of his religious beliefs:

> Mr. Renfro … [is] profoundly depressed. … He was suicidal before he killed anyone that night. He was writing out a will before he killed anyone that night. His belief is, as you mentioned earlier, his belief that if he kills himself, he'll go to hell. And so he wants – he was suicidal before the murders and he is still suicidal, but he doesn't want to go to hell, so he wants someone else to kill him. He's in a lot of pain. He's in a lot of emotional pain. His depression hasn't been treated. I expect he will always carry with him the guilt. He may not – if appropriately treated, he may not always be suicidal (RR 29:3744-45).

Social vulnerability and desires to hasten death

The gap between the Supreme Court's concern in *Glucksberg* for suicidality among very ill patients and its indifference to it among death-sentenced prisoners formally differentiates between the two, with suicidal death-sentenced prisoners obtaining less protection under the law. Yet, the Court in *Glucksberg* was not insensitive to the problems of social marginalization and desires to hasten death. It expressed concern that legalizing assisted suicide would expose "vulnerable groups – including the poor, the elderly, and disabled persons" to "abuse, neglect, and mistakes" (731) Quoting the New York Task Force, the Court wrote:

> Legalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable.... The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group (*Id.* at 732).

It is difficult to imagine a more profoundly stigmatized social group than death-sentenced prisoners[55] – perhaps justly – and the concerns the Court identifies regarding compromised autonomy and lack of access to good medical care apply with full force to prisoners. Indeed, the courts in *Rumbaugh* cited the poor mental health care in prison as a reason to permit Rumbaugh to waive his appeals: "[Rumbaugh's] ability to make the life/death choice is apparent from his comments … that if he thought that meaningful treatment were available and if it were offered, he would probably change his decision not to appeal" (Rumbaugh 1985:402).

More expansive right

Crediting of poor quality of life with no requirement of imminent death

While prisoners have less legal protection when it comes to suicidality, competence, and voluntariness, they simultaneously enjoy a more expansive right than individuals with terminal illnesses with respect to the importance of the individual's quality of life, social connectedness, and prognosis for survival. In *Glucksberg*, the State of Washington identified its "interest in preserving the lives of those who can still

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55 In addition to the stigma of their crime and punishment, death-sentenced prisoners tend to be drawn from marginalized groups. Justice Douglas noted in *Furman*: "Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society" (1972:251-52).

contribute to society and have the potential to enjoy life" (729) While this argument plainly leaves room for the State to abandon its interest in the lives of those too ill to contribute to society and to enjoy life, the Supreme Court upheld Washington's "insist[ence] that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. … [States] may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy" (729).

As discussed above, EHs frequently cite life in prison in explaining their desire to die. They enlist their poor quality of life to explain (successfully) why they should be allowed to hasten death. Therefore, the painfulness of daily life enables prisoners to hasten executions where very sick patients may not.

Further, the "right to die" movement has long struggled with whether to advocate for a right to die for individuals with chronic and debilitating illnesses in addition to those with terminal illnesses. Courts have been forced to decide whether the right to refuse treatment extended only to people with terminal illnesses, or whether people suffering from chronic but non-lethal illnesses could also refuse treatment. In *Bouvia v. Superior Court* (1986), the plaintiff wanted a nasogastric feeding tube removed. She did not have a terminal condition, but was quadriplegic, and required assistance to eat or drink. She sought to halt artificial nutrition and hydration because she no longer wanted to live. The California court sided with the plaintiff, and required the hospital to remove the feeding

tube. What mattered to the court was that Bouvia had decided her life was not worth living:

> In Elizabeth Bouvia's view, the quality of her life has been diminished to the point of hopelessness, uselessness, unenjoyability and frustration. She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless (1142-43).

More commonly, however, the law distinguishes between those with a terminal illness and those without. In *McKay v. Bergstedt* (1990), the Nevada Supreme Court held that non-terminal patients must obtain judicial approval prior to having life-sustaining treatment withdrawn, presumably because of a heightened state interest. The court defined "terminal" as the patient having less than six months to live. The Death With Dignity Acts passed in Oregon and Washington restrict the availability of physician-assisted suicide solely to individuals who, two doctors attest, have "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months" (ORS 127.800 §1.01(12), §2.01; RCW 70.245.010(13); 70.245.020).

By contrast, Texas execution-hasteners, who overwhelmingly seek execution very early in the appellate process, successfully hasten death when their execution would be years, and not months, away. Further, execution after the resolution of their appeals is by no means a certainty. Even Texas, an exceptionally active death penalty state, has not executed everyone sentenced to death.

Unilateral autonomy

Justice Stevens, while citing "history and tradition" and "the State's paternalistic interest in protecting the individual from the irrevocable consequences of an ill-advised decision motivated by temporary concerns" (740-41), also pointed to the importance of recognizing the individual's social embeddedness. "The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life" (*Id.* at 741 (footnote omitted)).

As described above in Chapter 4, most EHs do have some social connections. The legal framework for execution-hastening nonetheless excludes these relationships. While noting that "last minute petitions from parents of death row inmates may often be viewed sympathetically," the Supreme Court determined that the voices of families and friends are relevant only if the prisoner is first determined to be mentally incompetent (Baal v. Demosthenes 1990). If the prisoner is adjudged mentally incompetent, a "next friend" can step in for the prisoner and, under certain conditions, direct the litigation. Outside of this very narrow area, family and friends have no legal relevance.

Few next friend cases have been brought on behalf of Texas execution-hasteners.[56] In the Texas competency hearings, while families are not always invisible, no one represented their interests. In Joe Gonzales' case, the judge, clearly concerned about the life-ending decisions this prisoner was making, asked Gonzales whether he had a chance to speak with his family:

[56] I am aware of next friend actions to stay executions of Beavers, Hernandez, Morin, Rumbaugh, and James Smith.

Court: This is a very unusual situation, it is for me, for the system that we operate under. To me it is just – to me it is just not normal that you want to do what you want to do. It is almost like assisting you in a suicide, because you want to represent yourself on a case of this type.

… I wanted maybe a family member of yours to visit with you about reconsidering allowing the Court to appoint you an attorney to represent you. And since you have approached that subject, or brought that subject up,[57] do you think that would be helpful or necessary at all?

Gonzales: I don't think it would be necessary, because I have talked to – at length to most of my family, and my children about this. And they say I'm in charge of my life. What I do with my life is now my choice. They don't – they're not condemning me for doing it, and I'm not saying they're accepting it, because they do believe it is wrong. But this is something that I have thought about for quite some time, and this is what I want.

Court: Okay. So you don't think it is necessary that I ask [your lawyer] to bring some of your family members to visit with you about this decision?

Gonzales: If you think it would make a difference, I would say that you could bring some of my family members, as long as I was to pick which ones.

Court: Well, --

Gonzales: For instance, my sister, Tina, she is like a mother to me, since my mother passed away. And she will be totally against it. I don't want to put her through something like that. My other sister, Nan, we have talked about – at length about this, and she is in my corner.

Court: Okay.

Gonzales: She's more understanding.

…

Attorney: After speaking with Joe for as long as we have been together, I think he is trying to say, having family come here and discuss this or have a discourse with the Court might make it easier for the Court to allow him to proceed *pro se*. Is that right, Joe?

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[57] Gonzales had asked the court why his sister was in the courthouse (Gonzales RR 2:39).

> *Gonzales*: Let me put it this way. My family – none of my family members will change my mind. I am set on doing what I'm going to do. There is nothing they can say that could make me change my mind. (Gonzales RR 2:40-42)

Gonzales subsequently explained that at least one reason he seeks to hasten his execution was because of his family:

> And I cannot see myself going to prison, let's say for a life sentence, and have to do 35 years. I cannot put my children through that. I would not put my father through that for what they would have to go through (Gonzales RR 3:12).

Very unusually, in Porter's case, the prisoner's lawyer called Porter's mother to the stand. If she was to offer her perspective on whether she wanted her son to die, she was not asked about it. She was either not prepared by counsel to offer it, or simply did not want to do so. Instead, the questioning succeeded only in confirming that Porter had had the chance to discuss his decision with her.

Attorney:	And are you acquainted with James Scott Porter?
Mother:	Yes.
Attorney:	How are you related to him?
Mother:	I'm his mother.
Attorney:	His natural mother?
Mother:	Yes.
Attorney:	You are aware of your son's wish to end any further legal judicial proceedings to challenge his conviction for capital murder and death sentence?
Mother:	Yes. He wrote and told me he was going to do it.
Attorney:	When did you first become aware of that?
Mother:	About six months ago.
Attorney:	Okay. Had he consulted with you earlier about that?
Mother:	No.
Attorney:	Did you have any reason to believe that he wanted to dismiss his appeals or writs?
Mother:	No.
Attorney:	Okay. Six months ago when he wrote to you, did he want to speak with you about it? Tell us what the tenor of his letter was?

Mother: It's just that he was going to do it because it would be easier on us and none of us would have to suffer with.
Attorney: Did you visit him and discuss it with him in person?
Mother: I did visit with him; but no, we didn't discuss it.
Attorney: Did you want to discuss it with him?
Mother: Yes, but he had already told me he wasn't changing his mind.
Attorney: So he had an opportunity to talk with you about it, anyway?
Mother: Yeah.
Attorney: Is there anything more you would like the court to know before we release you?
Mother: The court?
Attorney: Yes, ma'am.
Mother: No.
Attorney: Okay.
Mother: No.
Attorney: Okay. Your Honor, I have no more questions for this witness.
Court: Do you have any questions, counsel for the State?
State's attorney: No, your Honor (Porter Hrg at 32-33).

The Court did not refer to her testimony in its ruling, nor did counsel referred to her testimony in argument.

In Gonzales' and Porter's cases, unusual for involving family in the first place, family were seen as agents to dissuade the prisoner from ending his life or attest to his fixity of purpose. Testimony about what the prisoner means to them, whether he has children who would suffer from his death, and whether they think his incarceration is a terrible burden on them is not included in the court's calculus of permitting the prisoner to take steps to hasten his execution. Justice Souter, recognizing that our lives are intertwined with others, was troubled at the prospect of individual making unilateral decisions to end their lives. By contrast, because the EH legal framework is structured around a waiver, rather than a balancing of interests, once the prisoner establishes mental competence, he is given complete autonomy in deciding whether to end his life.

CREATING THE FRAMEWORK

What accounts for these differences in judicial thinking about terminally ill and death-sentenced people? This section examines the historical context which legitimated both decisions to hasten death, and a legal and social backdrop that led to their very different framing.

Historical context

Gary Gilmore takes the stage

While conventional legal inquiry into appeal waivers usually begins its analysis with *Rees v. Peyton*, Gary Gilmore's case is ultimately more important in defining the modern "volunteer." While much of Gilmore's case seems peculiar to Gilmore – certainly no other execution-hastener inspired a Pulitzer Prize winning book, two television movies, the cover of a national newsweekly, a *Saturday Night Live* skit, and a pop song (Blume 2009) – in Gilmore's case we see not only the seeds of future death penalty cases, but also different logics that help explain how the Supreme Court came to take such a different stance toward death-seeking prisoners and death-seeking patients.

Melvin Rees sought to withdraw his Supreme Court appeal in 1965, as support for the death penalty waned (Banner 2002:244-247). After failing to coax the parties into a negotiated resolution of the case, the Court ordered the lower court to adjudicate Rees' competence. After multiple evaluations, Rees was found incompetent by the lower court, which filed its report to the Supreme Court in 1967. The Supreme Court never formally

acted further on Rees' case. Only after Rees' natural death did the Court dismiss his case, despite occasional prodding from the State of Virginia (Crocker 2004).

Gary Gilmore was not so easily put off. With the ink scarcely dry on the Supreme Court's *Gregg* decision reviving capital punishment in the United States, Gary Gilmore dared the State of Utah to kill him. At a trial court hearing after sentencing, Gilmore told the court, "You sentenced me to die. Unless it's a joke or something I want to go ahead and do it" (Mailer [1979] 1993:467). In a perfunctory hearing before the Utah Supreme Court, Gilmore, represented by counsel who assisted rather than opposed his efforts, testified that he knew he had a right to appeal; that he had told his attorneys that he did not want to appeal; that he had told him during the trial that if found guilty, he would prefer death to imprisonment; and that he preferred to keep the originally scheduled execution date. Despite protests from Gilmore's prior lawyer, no formal mental competency or waiver hearing was conducted (Blume 2009:213).

Less than five months after his crime and two months after his sentencing, Gilmore's case went before the United States Supreme Court (Gilmore v. Utah, 1976:440). Gilmore's mother, Bessie Gilmore, asked the Court as a "next friend" to stay Gary Gilmore's execution, arguing that he was not competent to knowingly and intelligently waive his rights. Bessie Gilmore's stay application informed the Court of "petitioner's history of suicidal tendencies, his November 16, 1976, suicide attempt, and his repeated request to be executed [to] indicate that petitioner's original waiver of appeal is an attempt to commit suicide" (Gilmore v. Utah 1976, Application for Stay of

Execution ("Stay App."):31). It cited psychiatric sources discussing the "impulse to suicide as a form of mental illness" (id., 31-32).

In addition to having a markedly swifter adjudication than Rees, this set up a very different mental health contest. Where Rees was delusional and psychotic (Crocker 2004), the Gilmore litigation instead focused on rival interpretations of his suicidality and its implications for his competence to waive his appeals (Stay App., 31-32).

The Attorney General responded:

> The dynamics of Gilmore's position demonstrate that his suicide attempt is not indicative of mental incompetence. After a trial in which he had not only the opportunity but ability to make a rational assessment of the evidence against him, Gilmore expressed his philosophical acceptance of the court's judge and asked to be allowed to respond with dignity. It was only after the first of what he feared could be many postponements that he apparently attempted to effectuate the sentence himself [by taking an overdose of pills]. Mr. Gilmore had sufficient experience of prison life that he was able to form an accurate estimation of what it would be like for him to languish in prison. The very report which warns of his suicidal tendencies does so within the specific context of the present situation and his perception of futility with the situation as it existed (Gilmore v. Utah 1976, Response to Application for Stay of Execution ("Stay Resp."):56-57).

In other words, Gilmore's post-death-sentencing suicide attempts were not pathological, but simply an "attempt[ ] to effectuate the sentence himself." His desire to die was rational: "Mr. Gilmore had sufficient experience of prison life that he was able to form an accurate estimation of what it would be like for him to languish in prison" (Stay Resp., 56-57). Gilmore should be accorded the "right to make a rational choice within the framework of his circumstances and personal philosophical constructs" (id., 57).

The Supreme Court stayed Gilmore's execution on December 3, 1976, to give it time to review certain documents. Ten days later, it lifted the stay, summarily finding that Gilmore was mentally competent and had made a knowing and intelligent waiver (1976:437). Justices White, Brennan, and Marshall dissented, complaining that without appellate review, no one could know whether the Utah death penalty statute was constitutional. This question needed to be resolved since Gilmore could not, under the Eighth Amendment, consent to an unconstitutional punishment.

Justice Marshall's dissent also paints a picture of informal, rushed, and (in his view) unreliable proceedings:

> Less than five months have passed since the commission of the crime; just over two months have elapsed since sentence was imposed. That is hardly sufficient time for mature consideration of the question, nor does Gilmore's erratic behavior from his suicide attempt to his state habeas petition evidence such deliberation. No adversary hearing has been held to examine the experts, all employed by the State of Utah, who have pronounced Gilmore sane. … In the transcripts that the [Utah Supreme] court prepared for us, it omitted a portion of its proceedings as having "no pertinency" to the issue of Gilmore's "having voluntarily and intelligently waived his right to appeal." That "irrelevant" portion involved a discussion by Gilmore's trial counsel of his opinion of Gilmore's competence and the constitutionality of the Utah statute. It is appalling that any court could consider these questions irrelevant to that determination. It is equally shocking that the Utah court, in a matter of such importance, failed even to have a court reporter present to transcribe the proceeding, instead relying on recordings made by dictating machines which have produced a partly unintelligible record (Gilmore 1976:440 (footnote omitted)).

Justice Marshall also observed that "the Prison Psychiatrist, the only doctor who has considered Gilmore's competency since the waiver decision was publicly announced, was based [his opinion of competency] on a review of Gilmore's medical records and a one-hour interview" (id. 440, n.2).

We see in Gilmore's case at least some of the problems plaguing the adjudication of execution-hasteners, at least in Texas. Questionable mental health assessments and non-adversarial proceedings can be acceptable. Desires to hasten execution can stand alongside with suicide attempts without defeating competence. The mother's interest in preventing execution is entirely contingent on the competency finding. The state interest in the legality of the conviction and sentence was a concern to no one but the dissenters.

Shifts in legal and political debates in criminal justice and the death penalty

Blume notes "the path was set" when the Supreme Court permitted Gilmore to waive his appeals (2009:228). Without disputing the contingent importance of Gilmore, the larger sociopolitical context helped cement and extend the Court's decision.

The 1970s witnessed important shifts in the American criminal justice system. The mobilization of pro-death penalty activists after *Furman*, and the rise of "law and order" politics alongside more retributive penal policies have been chronicled elsewhere (Garland 2010: 231-55; Simon 2007:116-30; Banner 2002:267-84). As Gilmore would be the first person executed in the modern death penalty era, his case also became a battlefield for the death penalty itself. National media covered Gilmore's case; activists mobilized; anti-death penalty lawyers launched multifarious efforts to halt Gilmore's execution (Mailer [1979] 1993; Blume 2009).

Executing Gilmore provided death penalty proponents with the opportunity to demonstrate the necessity of the death penalty (Blume 2009:227). Certainly Gilmore, with his extensive juvenile and adult history of crime and imprisonment (Blume 2009),

exemplified the failure of the rehabilitation model (Martinson 1974). One television writer reportedly said at the time that Gilmore's case was "an open commentary on the utter failure of our prison system to rehabilitate anybody" (Mailer [1979] 1993:572). As Blume (2009) points out, Gilmore presented none of the familiar concerns about the death penalty. He was white, unrehabilitated after repeated stints in prison, and not plainly mentally ill. He appeared intelligent, remorseless, and obnoxious, and admitted guilt consistent with other compelling evidence. Add to that the fact that Utah did not have the cultural baggage of the former Confederacy, Gilmore became, "in many respects, the perfect person to usher in the new era of executions" (Blume 2009:226).

Simultaneously, the Supreme Court was in the middle of the contentious debate regarding rights held by those accused of crimes. Most relevant here is the Court's landmark decision in *Faretta v. California* (1975). In *Faretta*, the Supreme Court decided that individuals have a constitutional right to represent themselves. They must not be required to have a lawyer "forced" upon them, even at a cost of a less reliable proceeding.

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law (Faretta v. California 1975: 834 (internal citations and punctuation omitted)).

The dissenters inveighed against this individualistic stance that it believed would undermine the criminal justice system as a whole:

> That goal [of justice] is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the 'freedom' 'to go to jail under his own banner.' The system of criminal justice should not be available as an instrument of self-destruction (Id. at 839-40 (Burger, C.J., dissenting) (internal citations and punctuation omitted.)).

Gilmore's symbolic importance could be seen as extending beyond a message that the death penalty was once again a punishment available to states. When the Supreme Court refused to stay Gilmore's execution, it may also have been signaling that it would limit the reach of cause lawyers[58] by strengthening the agency of the condemned individual, to the exclusion of broader systemic considerations.

In addition, as Gilmore himself noted, his desire to hasten death was situated within a cultural moment when a discourse of rational suicide and a right to die gained national prominence against a backdrop of the civil rights movements of the 1960s and 1970s (Hillyard and Dombrink 2001).

> You know, the U.S. Supreme Court has ruled that you have a right to die. I'm talking about the Karen Ann Quinlan case.[59] I don't even really think that enters, if I want to press for my civil rights. I could raise issues like that, but I'm not (Utah Board of Pardons Hearing 1976:12).

While questions of mercy killing and euthanasia were hardly new concepts by the 1970s, the social movement to establish a right to die coalesced with Quinlan's case (Lavi 2005:166; Hillyard and Dombrink 2001). By late 1976 and early 1977, when

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[58] Gilmore's mother was represented by Anthony Amsterdam. He exemplified the anti-death penalty cause lawyer, having argued *Furman* (1972) and by the time of Gilmore's case, appeared before the Supreme Court on at least eight death penalty cases.

[59] The New Jersey Supreme Court, not the United Supreme Court, decided the Quinlan case in March 1976 (In the Matter of Karen Quinlan, 355 A.2d 647 (N.J. 1976)). Gilmore's reference to this case, however, reflects its cultural currency at the time he sought to be executed.

Gilmore's case was being litigated, Karen Ann Quinlan's face had already appeared on the cover of *Newsweek* surrounded by the title "A Right to Die?" (Newsweek 11/3/75). A national discussion legitimating decisions to hasten death had begun in earnest.

Logic of death penalty law

While a discourse legitimating decisions hastening death in the medical context swirled around Gilmore, different conceptualizations of rights to die begin to account for their different outcomes. Where decisions to hasten death in the context of medical interventions require weighing state interests against the individual's desire, execution-hasteners require no such balancing. Instead, execution-hasteners offer a window onto how hermetic the "intrinsic rationality" (Garland 2010: 286) of the death penalty can be. Because a death-sentenced prisoner's desire to hasten death is conceptualized solely within the framework of rules and waiver, the concerns that we see in the context of the right to die of the terminally ill cannot penetrate.

Garland argues that American death penalty jurisprudence evolved to distance the death penalty from lynching, and one strategy included "rationalizing and juridifying"[60] the application of the death penalty (2010:262). The Supreme Court, Garland explains, developed a "discipline of legal rules and procedural propriety" … to "us[e] the values of liberalism (rule-based restraints on state power, respect for the individual, due process,

60 Garland defines juridification as "the regulation of state power by reference to legal rules and procedures" (Garland 2010:264). Other strategies included "civilizing and humanizing" the punishment by, e.g., excluding juveniles or those mentally ill at execution, and "democratizing and localizing" by shifting death penalty decisions to local participants (2010:268-80).

legality) to reshape America's capital punishment practice" (Garland 2010:263-65). The existence of rules and procedures, in other words, contributed to constituting a legitimate death penalty. Hand in hand with a logic of rules is the idea that rules can be waived, provided, of course, that the waiver follows certain rules. The waiver model works well – indeed, it can only exist – within a discourse of rules. It acknowledges the existence of rules, even as the individual invokes a desire not to take advantage of them.

Consistent with this conceptualization is the function of mental illness in Gilmore's case. Both the Application for a Stay of Execution filed by Gilmore's mother, as well as the response from the Attorney General of Utah spoke directly to Gilmore's efforts to kill himself (Stay App., 31-32; Stay Resp., 56-57). The desire to hasten death, however, was legally relevant only to the extent that it signified mental illness that undercut the validity of the waiver. Bessie Gilmore's stay application argued, "To permit a man to kill himself through legal process by his lack of rational choice affronts a most basic sense of justice," and specified that a proper waiver is the mechanism for protecting justice (Stay App., 32) (internal punctuation omitted). It did not draw on, for example, the historical proscriptions elaborately described by the Supreme Court in *Glucksberg*. Where the Supreme Court in *Glucksberg* struggled with weighing well-established countervailing interests to individual autonomy and defining a point on the continuum at which restrictions on decisions to hasten were acceptable, in the context of the death penalty, it conceived of decisions to hasten death among death-sentenced prisoners within a paradigm of rules. More generally, desires to hasten death in this population are not

interpreted as suicidal, but as legal decisions to abandon appeals. Further, the fact that many execution-hasteners tie their desire for execution to their beliefs in the death penalty affirms the legitimacy of the death penalty.

Cultural frames of mental illness and criminality

Execution-hastener cases and *Glucksberg* also present very different concerns about depression. With condemned prisoners, depression is not seen as a condition that impairs the prisoner's ability to make decision about hastening death. This may be part of a larger cultural ambivalence regarding depression as a form of mental illness, and the law generally fails to acknowledge the impact of impaired affective (as opposed to cognitive) states on decisionmaking (Pilgrim 2007; Maroney 2006). Certainly Melvin Rees, with his delusional thinking and psychotic preoccupations, conformed more closely to widespread ideas of what mental illness looks like than did Gary Gilmore (Perlin 1997). Notably, the Supreme Court has expressed greater concern over the reliability of the procedures to evaluate mental competency in both *Ford v. Wainwright* (1986) and *Panetti v. Quarterman* (2007), both of which involved prisoners with serious delusions, than it has in execution-hastener cases.[61]

This difference in interpreting depression and suicidality may also reflect a bias against recognizing mental dysfunction in criminals as it contradicts prevalent ideas about criminal intentionality and autonomy (LaChance 2007:703-704; Garland

[61] These cases also involved a different legal question – competency to be executed. Among other things, and generally unlike the Texas execution-hasteners cases, this meant that the prisoners' lawyers sought genuinely adversarial proceedings to test the mental health evidence.

2001:184). A *Newsweek* magazine cover[62] featuring Gary Gilmore evokes romantic notions of death-seeking. Gilmore looks directly at the camera, with what could be construed as a lopsided, and perhaps slightly menacing, grin on his face. He wears a short-sleeved prison jumpsuit that reveals handcuffs and his tattooed forearms. "Death Wish" is stamped in red on Gilmore's torso. It is easy to read into the image that Gilmore has a "death wish" because he is a thrill-seeking outlaw, not because he is depressed and sees no point to living.

SUMMARY

Justice Scalia, rarely a friend to the death row prisoner, quoted from 19th century court opinion in objecting to arguments for a fundamental right to die:

> The life of those to whom life has become a burden – of those who are hopelessly diseased or fatally wounded – nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live" (Cruzan 1990: 296 (Scalia, J., concurring) (citation omitted)).

In fact, the law does distinguish the "hopelessly diseased" from the condemned. While Gary Gilmore left an unmistakable imprint on the right to hasten death accorded death row prisoners, the continuing power of his example reflects that the law is guided by a particular definition of the social problem, namely, that of capital punishment. By not only involving criminal cases, which implicate normative ideas of who commits crimes and why, but also the death penalty, with its own logics and history, execution-

62 This image can be viewed at http://www.thedailybeast.com/content/newsweek/galleries/2011/09/25/reliving-history-the-death-penalty/_jcr_content/gallery/slide_2/image.img.jpg

hasteners have developed a right to die substantially removed from the wider social and legal debates over hastening death. Where this wider discussion has defined the problem as the hypermedicalized, debilitating, and painful "bad" death, it has also had to contend with the negative history of euthanasia, concern for marginalized, suicidal, and/or vulnerable individuals, and fears of a slippery slope into abusive or coercive efforts to end lives (Hillyard and Dombrink 2001). These legal differences therefore reflect not simply the unsurprising conclusion that death-sentenced prisoners have an easier time dying than most others. Instead, this difference is constructed by historical contingency, the logic of the American death penalty, cultural attitudes regarding mental dysfunction and criminality.

CONCLUSION

This dissertation integrates the study of execution-seeking individuals into a larger social scientific literature on desires to hasten death. It approached the question of execution-hastening by conducting a type of "sociological autopsy," using individual cases, but maintaining a social focus (Scourfield et al. 2012). As Scourfield and his colleagues also found, this method is not without problems. The passage of time may have intensified the tendency to attribute a motivation for hastening execution that drew more from conventional ideas rather than from what the EH said. All sources of information, whether human or documentary, are also irreducibly partial. Further, the work of research has inevitably simplified ambiguities and contradictions as I created categories and identified meaningful variables. Becoming an execution-hastener is a complex process that this dissertation is able to illuminate only in part.

Nonetheless, it contributes to the very little we know empirically about this population. I found, for example, that Texas EHs in this study resembled those who commit suicide in prison in certain respects. As with prison suicides, most EHs acted on the desire to hasten death before age 35. In addition, and also like prison suicides, EHs tend to act early. The EHs' early desire to hasten execution is consistent with the prison research finding that the risk of suicide is particularly elevated early in the criminal justice process.

Also like prisoners who suicide, EHs are more likely to have prior criminal convictions than non-execution-hasteners. The exception to this was among those

sentenced to death for offenses involving a domestic crisis. The IPV-EH subgroup appears overrepresented in Texas executions. While 21% of the Texas EH population committed an offense related to a domestic dispute, only 33, or 7.4% of the 444 non-consensual executions of men who committed similar crimes.

While the numbers are too small to make any strong claims about connections between intimate partner problems and execution-hasteners, the Texas data suggest that exploring this connection further with national data because of the resemblance to characteristics of homicide-suicides and homicide-parasuicides. As one informant said about an IPV-EH, he was "more or less a dead man since it happened" (Inf. 33:11). Consistent with the literature, some of the IPV-EH, particularly those who had killed a romantic partner, had a less significant criminal history and were older, were early and aggressive advocates for their execution (namely Larry Hayes, Steven Renfro, and Benjamin Stone). Hayes and Renfro were also believed to have attempted "suicide by cop" when they were arrested. As with the murder-suicides, they may have been motivated by these same feelings of guilt, a desire to reunite with the deceased, and at the same time, understood that they would struggle to create a new identity.

EHs, as compared to non-EHs, on average are more likely to have been convicted of crimes against people and had prior experiences with incarceration. They were more likely to have used a gun in the murder, and less likely to have committed the crime with another person. This could contribute to desires to hasten execution by increasing the prisoner's sense of social culpability.

The comparison group of non-EHs appeared to have more social support, although the measures should be improved. I found some difference in the vulnerabilities condemned prisoners brought to death row, but again, more information (particularly information that does not rest on court documents) is necessary.

Unlike other studies linking isolation confinement with increases in suicide, my data do not draw a strong connection between conditions of confinement and hastening execution. The slight increase in proportions hastening execution at the segregation prison is confounded by other factors, such as changes in the law and increase in executions overall.

The role of prison conditions should be more closely examined in light of the very early point at which most EHs articulate and often act upon their desire to hasten execution. The conditions may not instigate desires to hasten execution, but they may strengthen commitments to waive appeals. My research also suggests that prison culture and architecture may amplify or inhibit the effect of one prisoner's desire to hasten execution.

If EHs are in fact largely steadfast in their desire to die – and I want to emphasize that none of the informants had more than episodic contact – this would distinguish EHs from those with terminal illness and for that reason may illuminate an important alternative understanding of desires to hasten death. Research suggests that those with terminal illness experienced desires to hasten death at certain junctures (Nissim, Gagliese, Rodin 2009). It is easy to identify some analogs between the experiences of the

patient with a terminal illness and the capital defendant. The conviction or sentence (or crime) is the diagnosis; the waiting for medical appointments is the process of applying to courts for legal relief; the disappointing test results, the court losses. Because the transience of desires to die appears so regularly in the medical context, it would be useful to understand why the death row population would be so unwavering, and if they are, whether this is attributable to their greater psychological and psychiatric burden (Cunningham and Vigen 2002).

The fact that most EHs seek execution so early also warrants more empirical investigation because of its implications for the criminal justice system. Understanding of why some seek the death penalty even prior to arriving on death row, often prior to trial, is essential to keep death penalty trials from becoming empty rituals enabling the execution. As this research shows, when the law permits motivated prisoners to waive early, they often do. Given that the criminal justice system interacts to shape the EH experience, identifying whether patterns of when individuals express a desire for execution, when they act on it, and when they are permitted to abandon hold true in jurisdictions with a less active death penalty should be examined. This could improve our understanding of how legal processes interact with desires to die, and inform policy debates about the importance of legal safeguards to the adversarial system.

The meanings associated with hastening execution reveal the symbolic significance of death in this context. Prisoners subverted the execution's intended meaning by enlisting it in their campaigns of defiance and demonstrations of disinterest.

They recharacterized it as the lesser penalty. If you really wanted to punish me, you'd have given me a life sentence! Others embraced it to vouchsafe their remorse and expiate their sins, enacting their integration into a larger normative order. While we may not be prepared to lift the noose from their necks the way our Colonial forebearers might have done (Banner 2002), they raise the question whether these are really the people we are so keen to kill.

Of course, some observers reject this reframing. For example, Eliseo Moreno went to fairly extensive lengths to express his remorse. Among other things, he wrote letters to survivors of his victims to ask for forgiveness, and in his final statement, he emphasized his guilt and the religious justification for his execution. The sheriff from the county that prosecuted him was unmoved, "skeptical" of Moreno's prior suicide attempt and:

> [U]nconvinced by Moreno's expressions of remorse, saying religion is often used by death row inmates to evoke sympathy or mask their true feelings. "It's been said that God lives at TDC," [the sheriff] said. "I saw him (Moreno) at the trial. I saw no remorse in his face. If he's got religion, fine. That's between him and the man upstairs" (Bragg 1987).

One informant described another EH as always having a "poor me" attitude. While the EH had made profoundly remorseful statements, the informant described his attitude:

> Nobody has compassion for him. And that's just the kind of guy he was. Put me to death because nobody cares about me…. Typical addict. It's all about me attitude. And then a couple days after he murders two people, hey, you people-. Nobody likes me. This is about me. I'm hurt…. Depressed. He was very, very, very depressed. And still, it was all, you've got to feel sorry for me type depression. Nobody feels sorry for me (Inf. 33:2, 3).

For this informant, even as he recognized the EH's depression, he coded – and denigrated – it as "typical addict." The EH's criminality trumped the redeemed identity the EH sought to construct.

To the extent that EHs use frames of meaning to manage the deviance of, e.g., their embrace of execution and/or of their stigmatized identity, understanding how they manage challenges to the meanings they construct could offer insights into the sociology of deviance. In addition, further study of disjunctures of meaning, where the act of self-destruction is characterized as cynical or self-pitying by some, could offer insight why attitudes and behaviors that in the free-world connote suicidal depression and precipitate a mental health intervention become normalized in the criminal justice context.

The law also participates in the symbolic life of the death penalty, if more covertly. It selects from a cultural toolkit to create and enforce norms surrounding desires to hasten death. Micro-processes in court proceedings can minimize the deviance of requests to die. Macro-processes create categories of troubling and untroubling deaths. By improving our understanding of who and when people seek execution, the law may be better equipped to address questions about how to regulate death-seeking.

Appendix

Execution-Hasteners

Morin, Stephen
Rumbaugh, Charles
Barney, Jeffrey
Hernandez, Ramon
Moreno, Elisio
Streetman, Robert
Butler, Jerome
Smith, James
Cook, Anthony
Beavers, Richard
Lott, George
Banda, Esequel
Jenkins, Leo
Gonzales, Joe Jr.
Brimage, Richard Jr.
Stone, Benjamin
Renfro, Steven
Foust, Aaron
Tuttle, Charles
Smith, Richard
Atworth, Robert
Foster, Richard
Hayes, Larry
Matthews, Ynobe
Porter, James
Martinez, Alexander
Anderson, Robert
Swift, Christopher
Rodriguez Michael
Martinez, David
Simpson, Danielle

Matched Sample 1

Markum Duff-Smith
James Briddle
Joseph Jernigan
Henry Porter
Billy Joe Woods
Mikel Derrick
Johnny Pyles
Noble Mays
Jerry Hogue
Robert Drew
Joe Trevino
Johnny Anderson
Robert West
James Moreland
Robert Black
David Holland
Ronald Allridge
Tommy Jackson
Mario Marquez
Anthony Westley
Norman Green
Michael Lockhart
Michael McBride
John Moody
Gary Johnson
Kenneth McDuff
Larry Robison
Dennis Dowthitt
John Elliott
Jessie Joe Patrick
Kevin Zimmerman
John Amador
Humberto Leal
Eric Nenno
Ricky Blackmon
Alvin Crane

Roy Pippin	Kevin Varga
Michael Griffith	Clifford Kimmel
James Collier	Lamont Reese
Robert Morrow	Reginald Blanton
Douglas Roberts	Samuel Bustamente
Ryan Dickson	Yosvanis Valle
Gregory Wright	Heliberto Chi
Rex Mays	William Berkley
James Colburn	Michael Perry
Jeffery Doughtie	Patrick Knight
Bobby Cook	James Clark
Robert Henry	James Martinez
Dennis Bagwell	Frank Garcia
Jonathan Moore	Mark Stroman
James Knox	Paul Nuncio
Randall Hafdahl	Jesus Aguilar
Angel Maturino Resendiz	Milton Mathis
Billy Galloway	Kenneth Parr

Matched Sample 2

Markum Duff-Smith	James Collier
Billy Joe Woods	Robert Morrow
Mikel Derrick	Douglas Roberts
Jerry Hogue	Gregory Wright
Robert Drew	Rex Mays
Joe Trevino	James Colburn
James Moreland	Jeffery Doughtie
Robert Black	Dennis Bagwell
Tommy Jackson	Randall Hafdahl
Anthony Westley	Angel Maturino Resendiz
Michael Lockhart	Kevin Varga
John Moody	Lamont Reese
Kenneth McDuff	Yosvanis Valle
Larry Robison	Heliberto Chi
John Elliott	Michael Perry
Jessie Joe Patrick	Patrick Knight
John Amador	James Martinez
Ricky Blackmon	Paul Nuncio
Michael Griffith	Kenneth Parr

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